Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA

v.

TERI LYNN LEVANDUSKI,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

(1) Is evidence in the form of a letter written by a homicide victim predicting his death and accusing his wife of complicity in his murder, testimonial hearsay under *Crawford v. Washington*?

(2) Where the prosecution, having deemed the challenged evidence crucial to its case, fails to assert harmless error on appeal, does *Chapman v. California* require the grant of a new trial?

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ORDERS AND OPINIONS BELOW

On February 21, 2007, an unreported Order was entered by the Pennsylvania Supreme Court at No. 683 MAL 2006 denying a Petition for Allowance of Appeal (App. B). On March 28, 2007, the Pennsylvania Supreme Court denied reconsideration (App A). At issue was an Opinion of the Superior Court of Pennsylvania, *en banc,* dated August 2, 2006 at No. 937 EDA 2004 (App. C), reported at 907 A.2d 3 (Pa. Super. 2006). This opinion affirmed a sentence of life imprisonment imposed by the Court of Common Pleas of Monroe County, Pennsylvania entered on March 25, 2004, in a homicide case.

The Lower Court had held that it was proper to admit at trial a hearsay letter written by the ultimate victim of a homicide, predicting his death at the hands of the defendant, his common-law wife. On appeal, a panel of the Superior Court of Pennsylvania initially reversed, holding that under state law, the letter was inadmissible, and that the error was not harmless (App. D). On reconsideration, the Superior Court, sitting *en banc,* held that although the victim's letter was inadmissible hearsay under state law, the error was harmless (App. C). The court, noting that a federal question under *Crawford, infra* was preserved, expressly declined to address it.

STATEMENT OF JURISDICTION

Petitioner's case was decided by a Final Order without Opinion of the Pennsylvania Supreme Court on March 28, 2007. Jurisdiction is conferred by 28 U.S.C. §1257(a). This Petition for Writ of Certiorari is timely filed because it was mailed within 90 days of March 28, 2007. Rule 13.1. The federal constitutional issue was raised before the trial court (App. E), and preserved on appeal (App. C, D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution, Confrontation Clause

> "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner was convicted in state court of criminal homicide as an accomplice and sentenced to life imprisonment without parole. Prior to trial, Petitioner filed a motion seeking to bar the prosecution from using a hearsay letter written by the decedent predicting his death and blaming Petitioner for it, should it occur, which motion was denied by the Court which ruled "Defendant's motion in Limine to exclude the letter from the victim is granted to the extent that it may not be used as evidence of Defendant's guilt; however the letter may be used as evidence for other purposes." The trial court held that the letter was not "testimonial hearsay" subject to exclusion under *Crawford v. Washington* (App E). On appeal, a panel of the Superior Court of Pennsylvania reversed, agreeing that the letter was not testimonial under *Crawford*, but finding it inadmissible under Pennsylvania law (App. D). On reconsideration, a split court *en banc* affirmed the conviction, holding that although the letter was inadmissible under state law non-constitutional analysis, the error was harmless. The decision failed to address the *Crawford* issue, stating in footnote 7:

"Appellant's Sixth Amendment Confrontation Clause argument under *Crawford, supra,* implicates constitutional concerns. ... Thus, when 'testimonial statements' are at issue, the Confrontation Clause of the Constitution of the United States precludes the use of hearsay except in the most limited of circumstances. The *Crawford* rule, however, does not apply to 'non-testimonial' statements ... The *Crawford* court declined to define the term 'testimonial' ... Nevertheless, we need not decide whether Mr. Sandt's letter is non testimonial or whether it falls within some amorphous gray area of 'testi-

monial' statements, as Appellant contends. Because we have decided the letter was inadmissible on non-constitutional state law grounds, we decline to address Appellant's constitutional claim under *Crawford*. ..." (App. C)

The facts are as follows:

On November 27, 2002, Robert Sandt was found dead in his home, the victim of several gunshots. During the investigation at the crime scene, the police found a note authored by the decedent indicating that Petitioner, his common-law wife, had been engaged in an affair with another individual by the name of "Lenny" and indicating that Petitioner and Lenny had apparently plotted to kill the decedent. The text of the note is as follows:

> "To whom it may concern
>
> On around November 1st I found a note to teri from a truck driver from Newark NJ named Bob Beaton on the note he said he wanted to get together with her. So I ask her about it. She said that she get notes all the time from the horney truck drivers. So I started to look around Teri's things and found two more notes. So I looked in her pocket book and I found a letter. The letter was to a guy named Lenny a truck driver I think he lives in Hackettown NJ. And works for Inter county paving of Hacketown.
>
> It described how Teri love this man and how he made her felt and things they did. It brock my heart to read. So I looked even harder I found antother letter. It said that she wanted to leave me and that she could't stand me and said she wanted me gone so her and Lenny could be together and he should have everything I have. And that I was alazy fuck and didn't deserve to take another breath. She said I abused her and beat her. I have never hit her or any other woman in my life. I am writing this letter to tell someone that in the second letter

she said that some how they had to get rid of me so they could be together.

I found the second letter the day her and her mother went to Lancaster to a Christmas play and stayed over nite. That was November 21st and wasn't comeing home till late Nov 22nd She called about 9:50 PM the nite of the 21st. I went to bed about 11:00 PM I could not sleep thinking about her and this guy. So about 1:00 AM the dogs went crazy and were looking at the front door so I looked out the doorand there was this big guy looking in the window so I turned on the light and ask him who he was

He said his name was Lenny and that he wanted to talk about Teri. I let him into talk he told me he wanted Teri to live with him. We sat and talked till 3:45 AM about wate had been going on that he had been fucking her for about three months. I told him that I found the letter and I new all about him and her and that I would like to work it out with Teri and try to get thing back to the way we used to be. He said that he wanted her for his own. So we decided to, let her make the decision. He left about 3:45 AM Friday morning.

On Friday nite Teri and her morn got home I said we have to talk. She said ok so we sat down and I read the letter to her. She said that she was mad at me for not takeing her anywhere or do anything with her and that was why she was fucking this guy and wanted to live with him but couldn't pay me half of the value of the house + garage. That she thought that it would cost her 50 to 60 thousand dollars to pay me off. She said that she made good money now that she was working at the bridge.

So on Saturday Nov 23rd she went to see him and brake it off with him and stay with me. She was gone

from noon to six oclock that nite she said that he pleaded with her to leave me. She said that she told him that she didn't want to lose averything and told him that she wanted to try to salvage wate we had. So when she got hom she told me that it was over and she was going to try to work things with me. I said that I would try to forgive her and try to work things out with her. That nite I started to think about it. She had to go to work. So I layed in bed and was thinking about all of this. I couldn't sleep so I tought about how this guy knew were we lived.

I ask Teri if she told him were we lived. She said she didn't. So I was thinking about how he just stood and was looking in the door at 1:00 AM and tought about how anybody could just walk in from the road and be on my front port in the middle of the nite. This guys name is Lenny he is about 6 foot tall and is about 300 pounds has a big brown and grey beard and weris round glassis and skull cap black leather jacket and jeans. He drives 82 Ford pickup I don't know wat color. So Saturday I went to get my 22 pistol and it was gone,

I though I would load it and put it on my nite table in case he comes back at least I would have some protection I ask Teri the gun was she said she didn't know. I said it was on my dresser. She said she didn't take it I said there just her + me here and I didn't take so were did it get to. The guy told me was a convicte felon he also had on rubbr gloves so he didn't leave finger prints anywere. So I am thinking that maybe she gave him the gun to kill me with. That way no one would think some one killed me that I commited suaicide. Seeing it was my gun

So that why I am writing this letter in case I should end up shot by a 22 pistol. So nobody would think it was nothing but a suicide. I am going to put the letter I found

with this letter. So if anything happens you have something to show the right people.

Signed Robert SANDT"

Subsequently, a Criminal Complaint was lodged against the Petitioner, charging her as an accomplice to the first-degree murder of her common-law husband and related charges. The Commonwealth's theory was that Petitioner had furnished the murder weapon to her boyfriend, who was the shooter.

At trial, the Commonwealth, over objection, introduced the decedent's letter reproduced above. The jury found Petitioner guilty of all charges and she was sentenced to a period of life incarceration without possibility of parole.

REASONS FOR GRANTING THE WRIT

I. A Letter Written by the Ultimate Victim of a Homicide for Use by Authorities in the Event He Should Die, Implicating His Wife in His Eventual Murder, Is Testimonial Hearsay Under *Crawford v. Washington.*

The instant Petition for Writ of Certiorari should be granted because this case presents an important question as to what constitutes "testimonial" hearsay under *Crawford.* The challenged letter was summarized by the Superior Court panel (now retracted) as follows: "... the conclusion is inescapable that the contents of the letter, which provided (1) evidence of the relationship between the co-defendants, (2) evidence of appellant's motive, and (3) a link to the possible murder weapon, depended for its relevance upon the jury believing the content of the letter—in other words, the truth of the matter asserted." (App. D) Every appellate court which had considered the issue found that under state law, the letter was improperly admitted (App. C, D). However, under state law analysis, the error was deemed "harmless" (App. C), thus reversing a panel decision of the Superior Court of Pennsylvania, which had found the error not to be harmless (App. D).

It is respectfully submitted that the erroneously admitted letter constitutes a violation of rights of constitutional dimension. The statement is testimonial in nature, and should have been excluded under the rule enunciated in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed 2d 177, 203 (2004):

"The Confrontation Clause of the Sixth Amendment to the Constitution of the United States provides than an ac-

cused enjoys the right to be confronted with the witnesses against him. Testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. 'Where testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.'" *Crawford, supra.*

In the case at bar, the trial court held that *Crawford* did not apply, because the statement was non-testimonial (App. E), holding that the letter was merely "documentary evidence," a conclusion affirmed by the panel decision (now retracted) in footnote 7 of its majority opinion (App. D) and not addressed by the *en banc* decision for reasons stated in footnote 7 of the majority opinion (App. C). It is respectfully submitted that *Crawford* does apply to the writing at issue.

Although this Court has not defined the parameters of *Crawford's* penumbra, testimonial statements have been held to include those made by a declarant who at the time of making the statement would "reasonably expect that the statement might be used in future judicial proceedings." *United States v. Saget,* 377 F.3d 223, 228 (2nd Cir. 2004). Indeed, your Honorable Court, in *Crawford* defined a classification of testimonial statements as:

> "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52, 124 S.Ct. at 1364.

Professor *Ohlbaum,* in his treatise, suggests the following revision to the rules of evidence to reflect this holding:

> "Following *Crawford,* Rule 804(b)(3) would reemerge with clarity if it were amended to include the

following language [see *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)]:

> A statement knowingly made to law enforcement personnel, or in circumstances in which a reasonable person in the declarant's position would realize that the statement would likely be passed on to law enforcement personnel, shall not be admissible against an accused under this subdivison."

Ohlbaum on Pennsylvania Rules of Evidence, Sec. 802.08(2)(a), (2005-2006 Ed.). This test is clearly met in the instant case, since the declarant wrote the following at the end of his statement:

> "So that why I am writing this letter in case I should end up shot by a 22 pistol. So nobody would think it was nothing but a suicide. I am going to put the letter I found with this letter. So if anything happens you have something to show the right people.
>
> Signed Robert SANDT."

Accordingly, it is respectfully submitted that your Honorable Court should grant certiorari in the instant case to clarify this important issue.

II. The Error Was Not Harmless Under *Chapman v. California,* Especially Since the Prosecution Intentionally Did Not Raise This Issue.

The Commonwealth's theory of the case was that co-Defendant Lenny Fransen (who was separately tried and convicted of First Degree Homicide), was the shooter and that the victim's murder was planned in advance by Petitioner with Mr. Fransen, her lover. The evidence presented against Petitioner at trial was circumstantial. The Commonwealth conceded that there was evidence of a struggle on the porch where the shooting occurred, between Mr. Fransen and the victim,

thereby giving rise to a Defense contention that the murder was not planned. Furthermore. Petitioner's statement to the police was equivocal. Although she described wishing at times that her husband would die so she would be free to spend her life with Mr. Fransen, she also stated that her discussions with Mr. Fransen did not necessarily involve the death of the victim, but merely getting him out of her life. The District Attorney quoted the challenged letter extensively in his closing argument to rebut these contentions and to argue that the letter proves "some deception" on Petitioner's part.

The importance of this issue cannot be overstated. Petitioner's conviction was affirmed based upon a harmless error analysis under state law on a non-constitutional basis. Even on that basis, two justices of the Superior Court held that the error was not harmless beyond a reasonable doubt (App. C), employing the following test:

"The Commonwealth bears the burden of establishing the harmlessness of the error. The burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was *de minimis;* or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict." (App C)

However, it is well established that where constitutional rights are implicated, the proper standard to apply on direct appeal is that of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 17 L.Ed. 2d 705 (1967):

"The question is whether there is a reasonable possibility that the evidence complained of might have contributed

to the conviction." (quoting *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 ... We, therefore, do no more than adhere to the meaning of our *Fahy* Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

It is appropriate for your Honorable Court to consider the harmlessness of the error on direct appeal, as it is quite possible that a different standard enunciated in *Brecht v. Abrahamson,* 507 U.S. 619 (1993) might apply to situations where a constitutional error in a state trial is not recognized by the judiciary until a federal habeas corpus case under 28 U.S.C. sec. 2254 is filed. This issue is presently before your Court in *Fry v. Pliler,* 06-5247, argued March 20, 2007.

In the instant case, the panel decision of the Superior Court of Pennsylvania, (now retracted) addressed the harmless error issue as follows:

"As with any claim of error arising from an evidentiary ruling we must consider the question of prejudice. The well-established standard for gauging prejudice is that of 'harmless error' as defined in the landmark Supreme Court decision in *Commonwealth v. Story,* 476 Pa. 391, 405-406, 383 A.2d 155, 162 (1978). It may not be disputed that the letter was inclulpatory [sic] on its face. Moreover, the Commonwealth relied upon the contested letter to rebut appellant's defense theory that the murder of Mr. Sandt was the unfortunate outcome of a fight between the victim and the co-defendant that got out of control, and that she did not have the specific intent to commit first degree murder. See: *Commonwealth v. Laich, supra,* 566 Pa. [19] at 29-31, 777 A.2d [1057] at 1062-1064 [2001]. *Finally, it bears mention that the Commonwealth offers no argument on the issue of prejudice.* [emphasis added] (App 3)"

In *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed. 2d 125, the issue was whether the wrongful admission of a spouse's testimony against the accused was harmless. Your Court, finding that the error was not harmless stated:

"The mere presence of a wife as a witness against her husband in a case of this kind would most likely impress jurors adversely." This rationale applies equally in the case at bar.

Accordingly, your Honorable Court is respectfully requested to find that the constitutional error in this case was not harmless under federal standards, especially where the prosecution has intentionally failed to raise this issue on appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to the Pennsylvania Supreme Court to review the Order of that Court.

Respectfully submitted,
MARK S. LOVE
Attorney I.D. #24844
Attorney for Petitioner,
Teri Lynn Levanduski

CERTIFICATE OF SERVICE

I hereby certify that I am, this 11th day of June, 2007, serving by first class mail, postage prepaid, a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania of Teri Lynn Levanduski, Petitioner, upon the person listed below:

E. David Christine, Jr., Esq.
District Attorney of Monroe County
Monroe County Courthouse
Stroudsburg, PA 18360

MARK S. LOVE
Attorney for Petitioner,
Teri Lynn Levanduski

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 683 MAL 2006

Application for Reconsideration of
Petition for Allowance of Appeal

COMMONWEALTH OF PENNSYLVANIA, Respondent
v. TERI LYNN LEVANDUSKI, Petitioner

ORDER

PER CURIAM:

AND NOW, this 28th day of March, 2007, the Application for Reconsideration is **DENIED.**

TRUE & CORRECT COPY
ATTEST: MAR 28 2007
/s/Norina K. Blynn
NORINA K. BLYNN
CHIEF CLERK

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 683 MAL 2006

Petition for Allowance of Appeal from the
Order of the Superior Court

COMMONWEALTH OF PENNSYLVANIA, Respondent
v. TERI LYNN LEVANDUSKI, Petitioner

ORDER

PER CURIAM:

AND NOW, this 21st day of February, 2007, the Petition for Allowance of Appeal is **DENIED.**

APPENDIX C

J.E03004/05

2006 PA Super 204

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 937 EDA 2004

COMMONWEALTH OF PENNSYLVANIA, Appellee vs.
TERI LYNN LEVANDUSKI, Appellant

Appeal from the Judgment of Sentence March 25, 2004 In the Court of Common Pleas of Monroe County Criminal, No. 1519 Criminal 2002

BEFORE: DEL SOLE, P.J., JOYCE, MUSMANNO, LALLY-GREEN, TODD, KLEIN, BENDER, BOWES, AND GANTMAN, JJ.

OPINION BY GANTMAN, J.: Filed: August 2, 2006

¶ 1 Appellant, Teri Lynn Levanduski, appeals from the judgment of sentence entered in the Monroe County Court of Common Pleas, following her jury-trial conviction for murder in the first degree as an accomplice,[1] conspiracy to commit murder in the first degree,[2] hindering apprehension,[3] and solicitation to commit murder in the first degree.[4] Appellant asks us to determine whether: (1) the trial court committed reversible error when it admitted a letter, written by the victim, identifying Appellant as a suspect and suggesting her motive for his murder; (2) the suppression court erred when it refused to suppress Appellant's inculpatory statements, which were obtained during a custodial interrogation, absent ***Miranda***[5] warnings; (3) the trial court erred when it admitted into evidence at trial the nude and semi-nude photographs

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[1] 18 Pa.C.S.A. § 2501(a); 18 Pa.C.S.A. § 306.

[2] 18 Pa.C.S.A. § 2501(a); 18 Pa.C.S.A. § 903.

[3] 18 Pa.C.S.A. § 5105.

[4] 18 Pa.C.S.A. § 2501(a); 18 Pa.C.S.A. § 902.

[5] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

of Appellant and her paramour, Mr. Lennard Fransen. We hold: (1) the trial court erred when it admitted the victim's letter at trial, because the letter constitutes hearsay and does not qualify for admission at trial under a recognized exception to the hearsay rule; nevertheless, this evidentiary ruling was harmless error, where otherwise properly admitted evidence overwhelmingly established Appellant's guilt beyond a reasonable doubt; (2) Appellant's confession was admissible because she was not the subject of a custodial interrogation when she initially confessed; and, after receiving her ***Miranda*** warnings and waiving her right to remain silent and right to counsel, she freely and willingly repeated her confession to police; (3) Appellant's third issue is waived for failure to develop a cognizable or appropriate legal argument on appeal. Accordingly, we affirm.

¶ 2 The relevant facts of this case are as follows. Appellant's parents lived next door to Appellant and her common-law husband, Mr. Robert Sandt, the victim. On November 27, 2002, at approximately 10:10 P.M., Appellant's father was standing in his driveway outside his home. He heard sounds resembling gunshots coming from the home of Appellant and Mr. Sandt. Appellant's father saw exhaust rising from a car idling in Appellant's driveway. Shortly thereafter, Appellant's father saw a dirty white car with two occupants leaving Appellant's home.

¶ 3 Appellant's mother went to Appellant's home to check on Mr. Sandt. She entered the home through the back door and saw Mr. Sandt collapsed face down in a chair. There was blood on his face. Appellant's mother called 911, who asked her to take a pulse. Mr. Sandt had no pulse.[6]

---

[6] A subsequent medical examination revealed defensive wounds on Mr. Sandt's legs and arms; Mr. Sandt suffered five .22 caliber gun shots to the head, plus one in the back and one in the chest.

¶ 4 Appellant's mother called Appellant at work to report Mr. Sandt's death. Appellant left work to return home. When she reached her home, the police were already present and conducting an investigation. The police asked Appellant to wait at her parents' house next door.

¶ 5 Meanwhile, the police officers had noticed a clump of hair and some blood on the front porch of Appellant's home. A planter and some furniture had been knocked over, indicating a struggle had taken place. After obtaining search warrants, police officers examined the home including the contents of a trashcan located in the kitchen. In the trashcan, they found a ripped-up letter. Investigation revealed that Mr. Sandt had written the letter, but the police were unable to determine when Mr. Sandt had written the letter. In the letter, Mr. Sandt wrote of his suspicions about Appellant and Mr. Fransen and their plan to do away with Mr. Sandt. The letter hypothesized that Appellant and Mr. Fransen were going to kill Mr. Sandt with his own missing .22 caliber revolver. Mr. Sandt's letter read as follows:

> To whom it may concern
>
> On around November 1st I found a note to [Appellant] from a truck driver from Newark NJ named Bob Beaton on the note he said he wanted to get together with her. So I [asked] her about it. She said that she gets notes all the time from the [horny] truck drivers. So I started to look around [Appellant's] things and found two more notes. So I looked in her pocket book and I found a letter. The letter was to a guy named Lenny a truck driver I think he lives in [Hackettsown], NJ. And works for Inter [County Paving] of [Hackettsown]. It described how [Appellant loved] this man[,] how he made her [feel,] and things they did. It [broke] my heart to read. So I looked even harder [and] I found [another] letter. It said that she wanted to leave me and said she wanted me

gone so [she] and Lenny could be together and he should have everything I have. And that I was a lazy fuck and didn't deserve to take another breath. She said I abused her and beat her. I have never hit her or any other woman in my life. I am writing this letter to tell someone in the second letter she said that some how they had to get rid of me so they could be together. I found the second letter the day [she] and her mother went to Lancaster to a Christmas play and stayed over [night]. That was November 21st and wasn't coming home [until] late Nov 22nd. She called about 9:50 PM the [night] of the 21st. I went to bed about 11:00 PM. I could not sleep thinking about her and this guy. So about 1:00 AM the dogs went crazy and were looking out the door and there was this big guy looking in the window so I turned on the light and ask him who he was[.] He said his name was Lenny and that he wanted to talk about [Appellant]. I let him [in to] talk he told me he wanted [Appellant] to live with him. We sat and talked till 3:45 AM about [what] had been going on that he had been fucking her for about three months. I told him that I found the letter and I [knew] all about him and her and I would like to work it out with [Appellant] and try to get [things] back to the way we used to be. He said that he wanted her for his own. So we decided [to] let her make the decision. He left about 3:45 AM Friday morning. On Friday [night] [Appellant] and her mom got home I said we have to talk. She said ok so we sat down and I read the letter to her. She said that she was mad at me for not [taking] her anywhere or [doing] anything with her and that was why she was fucking this guy and wanted to live with him but couldn't pay me half of the value of the house [and] garage. That she thought that it would cost her 50 to 60 thousand dollars to pay me off. She said that she made

good money now that she was working at the bridge. So on Saturday Nov 23rd she went to see him and [break] it off with him and stay with me. She [was] gone from noon to six [o'clock;] that [night] she said that he pleaded with her to leave me. She said that she told him that she didn't want to lose [everything] and told him that she wanted to try to salvage [what] we had. So when she got home she told me that it was over and she was going to try to work things [out] with me. I said that I would try to forgive her and try to work things out with her. That [night] I started to think about it. She had to go to work. So I [lay] in bed and was thinking about all of this. I couldn't sleep so I [thought] about how this guy knew [where] we lived. I [asked Appellant] if she told him [where] we lived. She said she didn't. So I was thinking about how he just stood and was looking in the door at 1:00 A.M. and [thought] about how anybody could just walk in from the road and be on my front porch in the middle of the [night]. This [guy's] name is Lenny he is about 6 [feet] tall and is about 300 pounds has a big brown and grey beard and [wears] round [glasses] and skull cap, black leather jacket and jeans. He drives [a 1982] Ford pickup I don't know [what] color. So Saturday I went to get my 22 pistol and it was gone, I [thought] I would load it and put it on my [night] table in case he comes back[;] at least I would have some [protection.] I [asked Appellant where] the gun was [and] she said she didn't know. I said it was on my dresser. She said she didn't take [it.] I said there [was] just [she and I] here and I didn't take [it] so [where] did it get [to?] The guy told me [he] was a [convicted] felon [and he] also had on [rubber] gloves so he didn't leave finger prints anywhere. So I am thinking that maybe she gave him the gun to kill me with. That way no one would think [someone] killed [me,] that I [commit-

ted suicide]. Seeing it was my gun[.] So [that's] why I am writing this letter[,] in case I should end up shot by a 22 pistol. So nobody would think it was nothing but a suicide. I am going to put the letter I found with this letter. So if anything happens you have something to show the right people.

Signed Robert SANDT.

(Mr. Sandt's Letter, transcribed 12/19/02; R.R. 219a-228a).

¶ 6 Police questioned Appellant briefly at the scene and asked her to appear at the police station the next day for further questioning. Appellant stayed at her parents' house until 1:30 P.M. the next day. Then, she and her parents drove to the police station to meet with members of the Stroud Area Regional Police Department. Appellant spoke to detectives for about two and one half hours (1:50 P.M. to 4:20 P.M.). The detectives told Appellant she could leave the interview at any time, as she was not under arrest.

¶ 7 During the initial interview, Appellant made several highly incriminating admissions. The detectives informed Appellant of her ***Miranda*** rights. Appellant voluntarily waived her right to remain silent and the right to an attorney and continued to speak with the police. Essentially, Appellant admitted that for the past three months she had been having an affair with Mr. Fransen. Appellant wanted to leave Mr. Sandt and live with Mr. Fransen. Appellant told the police how on November 21, 2002, she went on an overnight trip with her mother. On the same night, Mr. Fransen made an unannounced visit to the marital home and asked Mr. Sandt to relinquish ties with Appellant. According to Appellant, Mr. Sandt responded that only Appellant could make that decision. However, if Appellant left Mr. Sandt, he expected reimbursement in the amount of $50,000.00 to $60,000.00 for what he considered his share of the marital property.

¶ 8 Appellant confessed she and Mr. Fransen had been contemplating various options to get rid of Mr. Sandt. They discussed staging a drug overdose, a hunting accident, or a suicide. They referred to their objective as "the mission." Appellant's statements also placed Mr. Fransen at the crime scene. She explained how Mr. Fransen planned their actions on the night of the murder; Mr. Fransen telephoned Appellant to say he would be outside her home at around 10:00 P.M. Mr. Fransen instructed Appellant to exit the home and get in her car as if she were headed to work. Mr. Fransen further instructed Appellant to wait in the car until he came out of the house. Appellant said she thought Mr. Fransen wanted to "straighten out" Mr. Sandt. She admitted she followed Mr. Fransen's instructions. She saw Mr. Fransen walk to the front porch as she walked to her car. She heard a scuffle and gunshots. Then she gave Mr. Fransen a ride to the main road in her white Volkswagen Passat. Appellant further confessed that on her way home from work after her mother's call, Appellant disposed of letters and photographs linking her to Mr. Fransen. Appellant completed a written statement of her version of the events and later agreed to a taped interview.

¶ 9 Based on Appellant's statements and other evidence developed during the investigation, the police arrested Appellant and Mr. Fransen and charged them with the murder of Mr. Sandt.

¶ 10 Prior to trial, Appellant filed a motion to suppress her statements to police and a motion in *limine* to preclude the admission of Mr. Sandt's letter. The court denied Appellant's motion to suppress her statements to police. The court granted in part and denied in part Appellant's motion in *limine*, ruling the letter was hearsay and inadmissible to prove the truth of the matters asserted. However, the court

determined the letter was admissible to prove motive as well as the relationship between Appellant and Mr. Fransen. Appellant and Mr. Fransen were tried separately.

¶ 11 Appellant's trial began on January 6, 2004. On January 13, 2004, the jury found Appellant guilty of first degree murder as an accomplice, conspiracy to commit murder in the first degree, hindering apprehension, and solicitation to commit murder in the first degree. By order dated March 25, 2004, the court sentenced Appellant to life imprisonment on the first degree murder as an accomplice conviction, plus restitution, burial expenses, and costs related to prosecution and to other requirements of the sentencing order. The court declined to impose any further sentence on the remaining convictions.

¶ 12 On April 1, 2004, Appellant timely filed a notice of appeal. On March 31, 2005, this Court filed an opinion, which vacated the judgment of sentence and remanded the matter for a new trial on the ground that Mr. Sandt's letter constituted inadmissible hearsay, because it was in fact presented for the truth of the matter asserted, but did not qualify under the recognized exceptions to the hearsay rule.

¶ 13 The dissent disagreed with the majority's resolution of the hearsay question. The dissent reasoned that the letter was admissible, subject to the trial court's limiting instructions, as evidence of Mr. Sandt's opinion regarding his relationship with Appellant. The letter expressed Mr. Sandt's state of mind regarding the breakdown of his relationship with Appellant. The dissent concluded the letter was admissible as evidence of Appellant's extramarital affair with Mr. Fransen as well as Appellant's ill will, malice or motive to murder Mr. Sandt.

¶ 14 On April 6, 2005, the Commonwealth filed a petition for reargument *en banc*. Principally, the Commonwealth

argued the letter was admissible at trial under the "state of mind" exception to the hearsay rule. By order dated May 27, 2005, this Court granted the Commonwealth's petition for reargument *en banc* and withdrew the panel decision.

¶ 15 In her substituted brief on reargument, Appellant presents three issues for our review:

> DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY ALLOWING THE COMMONWEALTH TO INTRODUCE INTO EVIDENCE AT TIME OF TRIAL AN ADMITTEDLY HEARSAY LETTER WRITTEN BY THE DECEDENT PREDICTING HIS DEATH AND STATING THAT IF HIS DEATH OCCURRED, IT WAS DUE TO THE ACTIONS OF [APPELLANT], HIS COMMON LAW WIFE?
>
> DID THE SUPPRESSION COURT ERR AS A MATTER OF LAW WHEN IT FAILED TO SUPPRESS THE STATEMENTS AND THE FRUITS THEREOF, OBTAINED BY THE POLICE FROM [APPELLANT] WHILE IN CUSTODY AT THE POLICE STATION, WHICH STATEMENTS WERE OBTAINED IN THE ABSENCE OF HER ***MIRANDA*** RIGHTS?
>
> DID THE TRIAL JUDGE ERR AS A MATTER OF LAW WHEN HE ALLOWED THE COMMONWEALTH TO INTRODUCE AT TIME OF TRIAL NUDE AND SEMI-NUDE PICTURES OF [APPELLANT] AND HER BOYFRIEND WHICH SERVED NO RELEVANT PURPOSE BUT MERELY INFLAMED THE PASSIONS AND PREJUDICES OF THE JURY?

(Appellant's Substituted Brief at 7).

¶ 16 In her first issue, Appellant argues the Commonwealth obtained a conviction by introducing improper evi-

dence at trial. Specifically, Appellant contends Mr. Sandt's letter, predicting his death and implicating Appellant, is inadmissible hearsay. Initially, Appellant avers Mr. Sandt's letter was "testimonial" in nature; and under ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004), the declarant of testimonial evidence must sit for cross-examination by the accused. Without the opportunity to cross-examine Mr. Sandt, Appellant claims she lost her right to confront her accuser, in violation of her constitutional right under the Confrontation Clause. Appellant maintains cross-examination of Mr. Sandt was the only way to test the reliability and veracity of his "testimonial" statements. Because Mr. Sandt was unavailable for cross-examination, his "testimonial" statements should have been deemed inadmissible at trial.

¶ 17 Appellant also contends Mr. Sandt's letter constituted inadmissible hearsay when analyzed under traditional Pennsylvania law, because the letter represents an out-of-court statement admitted to prove the truth of the matters asserted. Appellant posits the letter does not qualify under the standard hearsay exceptions known as "dying declaration," "excited utterance," "present sense impression," or "state of mind." (Appellant's Brief at 18).

¶ 18 According to Appellant, the "dying declaration" exception applies only to statements made when the declarant believes he is in fact dying. This case presented no evidence that Mr. Sandt was wounded, dying, or facing an immediate threat of death when he wrote the letter. No one knows when Mr. Sandt wrote the letter or whether he was the one who ripped it up and threw the letter away. (***Id.*** at 19).

¶ 19 Additionally, Appellant claims Pennsylvania law bars admission of narrative letters as excited utterances, where the justification for the "excited utterance" exception necessitates

a recent shocking or overpowering experience that makes the utterance likely to be truthful. Where the statement is in narrative form and refers to past events, it is not admissible as an excited utterance. ***(Id.*** at 19-20).

¶ 20 Appellant stresses the "present sense impression" exception to the hearsay rule does not apply to Mr. Sandt's letter, because the "present sense impression" exception requires the declarant to see the event and to make observations about it to another person present at the scene. The observations must be made at the time of the event, or very shortly after the event. Reliability is virtually assured by the coincidence of the event and the observations and by the fact that the observations were made to another person. Here, Mr. Sandt addressed his letter to persons unknown, who were not present, without coincidence of events and observations. ***(Id.*** at 20).

¶ 21 Appellant submits the "state of mind" exception to the hearsay rule does not apply to Mr. Sandt's letter, because the letter does not refer to statements made contemporaneously with the mental or physical condition described. Thus, statements concerning conversations or events which occurred weeks before the writing are too remote in time to represent the victim's state of mind. Notably, Appellant emphasizes Mr. Sandt's state of mind was not at issue in this case and cannot be used as evidence of Appellant's motive or state of mind, unless the statements were communicated to Appellant. Although the letter describes some discussions between Appellant and Mr. Sandt, his private fears were not discussed. In short, the letter lost its probative value because it was too remote in time from Mr. Sandt's death, his fears were not communicated to Appellant, and the Commonwealth conceded Mr. Sandt was the one who ripped up the letter and threw it away. ***(Id.*** at 21-22).

¶ 22 In any event, Appellant maintains the letter was needlessly cumulative and unnecessary to establish Appellant's motive or her extramarital relationship with Mr. Fransen, given the other properly admitted evidence at trial, including letters from Appellant to Mr. Fransen, professing her love for him. The court should have excluded Mr. Sandt's letter, pursuant to its gate-keeping function, where the prejudicial effect of the letter was so great that no limiting instruction could cure the undue prejudice caused by admission of the letter at trial. Appellant concludes the court committed reversible error when it allowed the jury to consider Mr. Sandt's letter, and Appellant deserves a new trial as a result.

¶ 23 In response, the Commonwealth observes that an out-of-court statement may be admitted to establish motive, if the statement is not offered for the truth of the matter asserted. The Commonwealth claims it did not offer, and the trial court did not admit, Mr. Sandt's letter to prove the truth of matters asserted in the letter. To the contrary, the trial court admitted the letter for the limited purpose of establishing Appellant's relationship with Mr. Fransen and her motive to harm Mr. Sandt. The trial court's limiting instruction to the jury emphasized the narrow evidentiary use of the letter.

¶ 24 Even if Mr. Sandt's letter is hearsay, the Commonwealth argues the letter qualifies under the "state of mind" exception to the hearsay rule, because the letter informs the jury of Appellant's intent and motive, albeit through Mr. Sandt's state of mind. The Commonwealth also cites Pa.R.E. 804(b)(6) ("forfeiture by wrong doing" hearsay exception). The Commonwealth contends Appellant should not benefit from Mr. Sandt's unavailability as a witness, where she was involved in securing his unavailability. The Commonwealth also urges admissibility of the letter under the "complete story" doctrine, because Mr. Sandt's letter (1) told the story of Appel-

lant, Mr. Fransen, and Mr. Sandt, along with the natural progression of events leading to Mr. Sandt's murder, (2) provided evidence of a "prior bad act", and (3) gave the police a factual basis for their investigative decisions. Briefly, the Commonwealth submits Mr. Sandt's letter contributed to the "complete story" of the case by giving context to certain events near in time and place to Mr. Sandt's death.

¶ 25 Moreover, the Commonwealth tells us the court provided a carefully worded limiting instruction to ensure Mr. Sandt's letter would be used solely to demonstrate Appellant's motive and her relationship with Mr. Fransen, not for the truth of the matters asserted in the letter. Significantly, any unfair prejudice was outweighed by ample, otherwise properly admitted evidence of Appellant's guilt, including Appellant's own admissions. The Commonwealth concludes the letter was either properly admitted with a limiting instruction or, in the alternative, its admission constituted harmless error, in view of the overwhelming other evidence of Appellant's guilt. For the following reasons, we conclude the letter was improperly admitted at Appellant's trial, but its admission constituted harmless error.

¶ 26 The standard of review for admission of evidence is as follows:

> Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.

Commonwealth v. Drumheller, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *certiorari denied,* 539 U.S. 919, 123 S.Ct.

2284, 156 L.Ed.2d 137 (2003). ***See also Commonwealth v Lewis,*** 885 A.2d 51, 54 (Pa.Super. 2005).

> Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.

Commonwealth v. Hunt, 858 A.2d 1234, 1238 (Pa.Super. 2004) *(en banc), appeal denied,* 583 Pa. 659, 875 A.2d 1073 (2005) (internal citations and quotation marks omitted).

¶ 27 Initially we observe settled Pennsylvania law provides "a restraining principle that counsels against reaching a constitutional question if a non-constitutional ground for decision is available." ***Com., Dept. of Transp. v. Taylor,*** 576 Pa. 622, 633, 841 A.2d 108, 114 (2004) (citing ***P.J.S. v. Pennsylvania State Ethics Com'n,*** 555 Pa. 149, 153, 723 A.2d 174, 176 (1999)). ***See also Commonwealth v. Kennedy,*** 583 Pa. 208, 876 A.2d 939 (2005) (declining to address merit of appellant's Sixth Amendment Constitutional claim because matter was decided under state law work-product doctrine). In deference to this rule, we will address Appellant's arguments in reverse order. ***See P.J.S., supra.***

¶ 28 Pennsylvania Rule of Evidence 801 defines hearsay as follows:

> **Rule 801. Definitions**
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.

> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Pa.R.E. 801. Pennsylvania Rule of Evidence 803 provides exceptions to the hearsay rule and states, in pertinent part:

> **Rule 803. Hearsay exceptions; availability of declarant immaterial**
>
> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> **(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> **(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

Pa.R.E. 803. ***See Commonwealth v. Gray,*** 867 A.2d 560 (Pa.Super. 2005), *appeal denied,* 583 Pa. 694, 879 A.2d 781 (2005) (applying "present sense impression" exception to hearsay rule only if declarant had no opportunity to form purpose of misstating observation). ***See Commonwealth v. Hood,*** 872 A.2d 175, 181 (Pa.Super. 2005), *appeal denied,* ___ Pa. ___, 889 A.2d 88 (2005) (stating "excited utterance" excep-

tion to hearsay rule admits statements made while declarant was under stress of excitement caused by event or condition related to startling event); ***Commonwealth v. Carmody***, 799 A.2d 143 (Pa.Super. 2002) (describing excited utterance as "a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its being emanated in whole or in part from his reflective faculties").

¶ 29 Additionally, when the declarant is unavailable, the rules of evidence provide:

> **Rule 804. Hearsay exceptions; declarant unavailable**
>
> * * *
>
> **(b) Hearsay Exceptions.** The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (2) *Statement under belief of impending death. A* statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
>
> * * *
>
> (6) *Forfeiture by wrongdoing. A* statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Pa.R.E. 804. ***See Commonwealth v. Griffin***, 684 A.2d 589, 663-64 (Pa.Super. 1996) (stating use of "dying declaration"

exception to hearsay rule "depends on all surrounding circumstances" and applies in murder trial "if the declarant identifies his attacker, the declarant believes he is going to die, death is imminent, and death actually results"). ***See Commonwealth v. Santiago,*** 822 A.2d 716, 729 (Pa.Super. 2003), *appeal denied,* 577 Pa. 679, 843 A.2d 1237 (2004), *cert. denied,* 542 U.S. 942, 124 S.Ct. 2916, 159 L.Ed.2d 820 (2004) (stating "forfeiture by wrongdoing" exception to hearsay rule applies when accused's criminal wrongdoing was committed with intent to make witness unavailable to testify; the exception does not apply when defendant murdered victim not to prevent him from testifying but because of personal animosity) (citing ***Commonwealth v. Laich,*** 566 Pa. 19, 28 n.4, 777 A.2d 1057, 1062 n.4 (2001)).

¶ 30 Regarding the "state of mind" exception to the hearsay rule under Rule 803(3), our Supreme Court has stated:

> Pursuant to the state of mind hearsay exception, where a declarant's out-of-court statements demonstrate **[the declarant's] state of mind,** are made in a natural manner, and are material and relevant, they are admissible pursuant to the exception. Out-of-court declarations that fall within the state of mind hearsay exception are still subject to general evidentiary rules governing competency and relevancy. Accordingly, whatever purpose the statement is offered for, be it to show **the declarant's** intention, familiarity, or sanity, that purpose must be a "factor in issue," that is, relevant. Evidence is relevant if it logically tends to establish a material fact in the case, if it tends to make a fact at issue more or less probable, or if it supports a reasonable inference or presumption regarding the existence of a material fact.

Id. at 26, 777 A.2d at 1060-61 (emphasis added). In other words, the declarant's state of mind must be relevant. ***Id.***

Where, however, the declarant's state of mind is not a factor at issue in the case, the declarant's statement is immaterial and irrelevant to the prosecution's case. ***Commonwealth v. Thornton,*** 494 Pa. 260, 431 A.2d 248 (1981).

¶ 31 In ***Thornton,*** the declarant-victim's statement was admitted at trial under the "state of mind" exception to the hearsay rule. The challenged testimony was given by the police officer who responded to a domestic altercation the night before the victim was killed. Over defense objection, the police officer testified at trial that the victim told police the victim was carrying a gun for protection from the Thornton brothers, who were after him. ***Id.*** The statement was offered to prove the victim feared the defendant. Although the statement was hearsay, the trial court admitted the testimony as evidence of the declarant-victim's state of mind. ***Id.*** On appeal, and in response to the Commonwealth's assertion that the declarant-victim's statement was admissible to establish the victim's fear and came within the "state of mind" exception to the rule against hearsay, our Supreme Court reasoned:

> It is true that the declaration perhaps tends to establish that the [declarant-victim] was fearful of the Thorntons. However, the [declarant-victim's] state of mind was not a matter in issue in this case. It was appellant's state of mind, not that of the victim, which was material to establish the degree of guilt, if any, on the charge of criminal homicide.
>
> Only when the declaration is considered for the truth of the matter asserted, that appellant and his brother "were after" the [declarant-victim], does the declaration become relevant, that is, both material to and probative of appellant's intent to kill. However, when considered for its substantive truth, the declaration, al-

> though relevant, is incompetent and hence inadmissible because it is hearsay not within any exception. Thus, appellant's objection to admission of the declaration should have been sustained and the testimony excluded.

Id. at 265, 431 A.2d at 251 (internal citation omitted). Although the Court held the victim's statement was inadmissible hearsay, the Court further held:

> Given the overwhelming evidence of an intentional killing ... there is no reasonable possibility that the trial court's erroneous evidentiary ruling could have contributed to the jury's verdict. Thus, the error is harmless and the jury's verdict may not be disturbed.

Id. at 268, 431 A.2d at 252. ***Compare Commonwealth v. Puksar,*** 559 Pa. 358, 368, 740 A.2d 219, 225 (1999), *cert. denied,* 531 U.S. 829, 121 S.Ct. 79, 148 L.Ed.2d 42 (2000) (admitting testimony at trial from witness who overheard dispute between victim and accused, because fact that dispute occurred demonstrated ill-will between victim and accused as well as accused's motive for killing victim; testimony did not pertain to truth of subject matter of dispute but only to fact that dispute occurred); ***Commonwealth v. Chandler,*** 554 Pa. 401, 721 A.2d 1040 (1998) (deeming issue waived on other grounds, but discussing admissibility of testimony by victim's family and co-workers limited to their eyewitness observations of physical signs of abuse, which were not hearsay, and statements of victim limited to her negative feelings about accused and her marriage to him); ***Commonwealth v. Sneeringer*** 668 A.2d 1167 (Pa.Super. 1995), *appeal denied,* 545 Pa. 651, 680 A.2d 1161 (1996) (affirming trial court's decision to allow witness to testify about victim's stated intention to sever relationship with accused; evidence of victim's intent to end relationship allowed jurors to infer accused's motive for killing victim).

¶ 32 Furthermore, our Supreme Court has interpreted the common law "special circumstance" doctrine as applicable under very limited circumstances:

> Evidence of distinct crimes is not admissible against a defendant being prosecuted for another crime solely to show his bad character and his propensity for committing criminal acts. However, evidence of other crimes and/or violent acts may be admissible in special circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad character. As we recently stated ...:
>
> [T]he general rule prohibiting the admission of evidence of prior crimes nevertheless allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.
>
> This list of "special circumstances" is not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. ...
>
> Another "special circumstance" where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special

> circumstance, sometimes referred to as the *"res gestae"* exception to the general proscription against evidence of other crimes, is also known as the "complete story" rationale, *i.e.*, evidence of other criminal acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.

Commonwealth. v. Lark, 518 Pa. 290, 302-303, 543 A.2d 491, 497 (1988) (admitting into evidence at trial interwoven threats, intimidations, and criminal activities relevant to prove motive, intent, and identity; because of logical connection between crimes, proof of one naturally tended to demonstrate proof of another) (internal citations omitted).

¶ 33 In the instant case, the trial court responded to Appellant's objection to the admission of Mr. Sandt's letter as follows:

> [Appellant] alleges that this letter is hearsay and fails to qualify for any of the enumerated hearsay exceptions pursuant to the Pennsylvania Rules of Evidence. We agree. Therefore, this letter will be excluded from evidence for purpose of proving the truth of the matter asserted, that being that Appellant participated in the murder of the victim.
>
> Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. The letter written by the victim, which implicated [Appellant and Mr. Fransen], meets this definition. It was not made by the victim through the testimony at a trial or hearing and it is being offered to prove [Appellant's] involvement in the murder of the victim.
>
> However, "when an extrajudicial statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under

> the hearsay rule." [***Puksar, supra*** at 225.] Extrajudicial statements are "admissible to establish ill-will or motive where they are not being offered for the truth of the matter contained therein." [***Id.***] Therefore, we conclude that the letter written by the victim is admissible as evidence of a prior relationship between [Appellant and Mr. Fransen]. Furthermore, this letter is admissible as evidence of [Appellant's] motive to cause harm to the victim based on her relationship with another man and her allegations of the victim's abusive conduct towards her.

(Omnibus Pre-trial Motion Opinion, dated June 16, 2003, at 17-18) (some internal citations omitted).

¶ 34 We agree with the trial court that the letter constituted inadmissible hearsay. We disagree, however, with the court's decision to admit the letter under ***Puksar*** for the following reasons. In his letter, Mr. Sandt wrote about the relationship between Appellant and Mr. Fransen and referred to: Appellant's allegations of spousal abuse; Appellant's desire to further her relationship with Mr. Fransen; Mr. Sandt's own demand for his share of the marital property; and, the possible nexus between Appellant and Mr. Fransen, and Mr. Sandt's missing .22 caliber revolver. Unlike the extrajudicial statement in ***Puksar,*** the evidentiary value of Mr. Sandt's letter depended on the truth of its content. ***See Thornton, supra.*** The mere existence of the letter itself was not enough to prove Appellant's relationship with Mr. Fransen or her motive to kill Mr. Sandt. Here, the jurors had to believe the actual text of the letter, that is, the matters asserted in it, to grasp what the letter was offered at trial to prove. ***See id.*** We conclude the letter was hearsay, ***Thornton*** controls, and ***Puksar*** does not apply.

¶ 35 Therefore, as hearsay, Mr. Sandt's letter was admissible only if it fell within a recognized exception to the hearsay rule. **See** Pa.R.E. 803, 804. The letter does not serve as a

present sense impression, because Mr. Sandt did not write the letter as he perceived the events related in the letter or immediately thereafter. In fact, we do not know when Mr. Sandt wrote the letter. Thus, he might have had ample opportunity to form the purpose to misstate the facts contained in the letter. **See** Pa.R.E. 803(1); ***Gray, supra.***

¶ 36 Likewise, the "excited utterance" exception to the hearsay rule does not apply in this case, because Mr. Sandt's letter recounts a series of past events. The letter does not describe a startling event. Again, absent evidence of when Mr. Sandt wrote the letter, we cannot analyze whether he wrote the letter under the stress of excitement caused by some shocking occurrence or whether it "emanated from his reflective faculties." ***See*** Pa.R.E. 803(2); ***Hood, supra; Carmody, supra.***

¶ 37 Furthermore, the "dying declaration" exception to the hearsay rule does not apply. Mr. Sandt's letter does not identify an "attacker." Instead, the letter suggests to the reader that if some untoward event should happen to Mr. Sandt, the doer might be Mr. Fransen. Mr. Sandt's letter does not suggest that his death is imminent. The letter simply proposes suspects if his death should occur and a possible murder weapon. **See** Pa.R.E. 804(b)(2); ***Griffin, supra.***

¶ 38 Additionally, there is no evidence to suggest Appellant and Mr. Fransen murdered Mr. Sandt to procure his unavailability as a witness at his own murder trial. To the contrary, the letter insinuates only personal animosity. Therefore, the hearsay exception of "forfeiture by wrongdoing" does not apply to the letter. ***See*** Pa.R.E. 804(b)(6); ***Santiago, supra.*** Accordingly, Mr. Sandt's letter does not fit within the "present sense impression," "excited utterance," "dying declaration," or "forfeiture by wrongdoing" exceptions to the hearsay rule.

¶ 39 The "state of mind" exception to the hearsay rule presents a more problematic analysis. We first observe that Mr. Sandt's letter was offered as evidence of **Appellant's** "state of mind." However, the "state of mind" exception traditionally applies to the declarant's state of mind, emotion, sensation or physical condition such as intent, plan, motive, design, mental feeling, pain, and bodily health. ***See*** Pa.R.E. 803(3). Under the common application of this hearsay exception, Mr. Sandt's letter could be used to establish his own state of mind, but not Appellant's state of mind. Mr. Sandt's state of mind was not a matter at issue in this case. Only when Mr. Sandt's letter is considered for the truth of the matter asserted, does it becomes relevant, that is material to and probative of Appellant's intent or motive to kill Mr. Sandt. **See *Thornton, supra.*** However, when considered for its substantive truth, although relevant, the letter is incompetent and therefore inadmissible. ***See id.*** To the extent the letter serves to reveal Mr. Sandt's memory or belief under the "state of mind" exception to the hearsay rule, the letter must relate to the execution, revocation, identification, or terms of Mr. Sandt's will, which the letter does not. ***See*** Pa.R.E. 803(3). Thus, the letter was inadmissible under the "state of mind" exception as traditionally applied.

¶ 40 We recognize that in ***Chandler, supra*** and ***Sneeringer, supra*** the appellate Courts affirmed the trial court's decision to admit, under the "state of mind" exception, third-party testimony about a victim's statements regarding her relationship with the accused, as evidence of the accused's intent, motive or ill will toward the victim. ***See also Commonwealth v. Stallworth,*** 566 Pa. 349, 781 A.2d 110 (2001) (affirming trial court's decision to admit victim's Protection From Abuse application, made one day before she was killed; petition included specific allegations involving

threats made by accused to victim; Supreme Court held allegations were probative of accused's intent and motive to harm victim; PFA evidence was also indicative of victim's state of mind regarding accused and her relationship with him as she perceived it; allegations in PFA application were further supported by testimony of eight eyewitnesses to accused's threats, as evidence of accused's ill will toward victim and to show nature of relationship between accused and victim). In each case, the victim's statements demonstrated the victim's intent to end a relationship with the accused, which allowed the jury to infer the accused's motive to kill the victim. ***See Chandler, supra; Sneeringer, supra.*** In ***Stallworth*** and ***Chandler,*** there was also independent eyewitness testimony on the nature of the relationship between the victims and the defendants.

¶ 41 The letter in the instant case does not generate the same probative value as the victims' statements in the cited cases. Here, Mr. Sandt's letter is mostly his commentary on the relationship between the codefendants. In fact, the trial court admitted the letter as evidence of the relationship between Appellant and Mr. Fransen. On the other hand, the letter conveys a very mixed message regarding the state of the relationship between Appellant and Mr. Sandt, vacillating between possible separation and promises of reconciliation. Significantly, the letter does not contain any threats made on Mr. Sandt's life, by either Appellant or Mr. Fransen. At most, the letter represents pure conjecture well-seasoned with romantic hyperbole.

¶ 42 Moreover, we reject the Commonwealth's *res gestae* argument to justify admission of the letter at trial as evidence of the "complete story" of the case. Given the tentative nature of the letter, its admission at trial does not serve any of the legitimate purposes identified in ***Lark, supra.*** Instead,

Mr. Sandt's letter generates only a weak prediction of his possible murder and Appellant's motive, intent, common scheme or plan. While some portions of the letter might be read as a possible motive to harm Mr. Sandt, the unconfirmed nature of the letter prohibits its use as proof that Appellant actually intended to murder Mr. Sandt. ***Id.*** Further, Mr. Sandt's letter fails to describe specific prior criminal acts or to serve as a complete story of the crime on trial. Therefore, the letter does not meet the "complete story" concept described in ***Lark, supra,*** where evidence of other crimes may be relevant and admissible as part of the chain or sequence of events which became the history of the case and formed the natural development of the facts. ***See id.*** Thus, under the Pennsylvania Rules of Evidence, the letter should have been excluded at trial. ***See Thornton, supra; Lark, supra.***[7]

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[7] Appellant's Sixth Amendment Confrontation Clause argument under ***Crawford, supra,*** implicates constitutional concerns. The United States Supreme Court in ***Crawford*** stated: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61, 124 S.Ct. at 1370, 158 L.Ed.2d at ___. Thus, when "testimonial statements" are at issue, the Confrontation Clause of the Constitution of the United States precludes the use of hearsay except in the most limited of circumstances. The ***Crawford*** rule, however, does not apply to "non-testimonial" statements. "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law...and [exempt] such statements from Confrontation Clause scrutiny altogether." **Id.** at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at ___. The ***Crawford*** Court declined to define the term "testimonial" but stated: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." ***Id.*** The ***Crawford*** Court suggests there might be other situations which also give rise to "testimonial" statements. ***See, e.g., Commonwealth v. Dargan,*** 897 A.2d 496, 502-03 (Pa.Super. 2006) (observing crucial distinction between testimonial and non-testimonial statements for ***Crawford*** purposes "seems to lie in whether they were the product of interrogation or specific inquiry of almost any sort or were voluntary"; what is critical is whether declarant deliberately made statements with view to later prosecutorial

¶ 43 Despite the decided inadmissibility at trial of Mr. Sandt's letter, "Not all violations of the accused's right to confront his witnesses result in reversible error. The appropriate standard for review under these circumstances is the harmless error test as set forth in ***Commonwealth v. Story,*** 476 Pa. 391, 383 A.2d 155 (1978)." ***Commonwealth v. Marinelli,*** 547 Pa. 294, 328, 690 A.2d 203, 220 (1997), *cert. denied,* 523 U.S. 1024, 118 S.Ct. 1309, 140 L.Ed.2d 473 (1998). This Court commented on the harmless error test stating: "Not all errors at trial, however, entitle an appellant to a new trial, and [t]he harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial...." ***Commonwealth v. West,*** 834 A.2d 625, 634 (Pa.Super. 2003), *appeal denied,* ___ Pa. ___, 889 A.2d 1216 (2005) (quoting ***Commonwealth v. Drummond,*** 775 A.2d 849, 853 (Pa.Super. 2001), *appeal denied,* 567 Pa. 756, 790 A.2d 1013 (2001) (internal citations and quotations omitted)). Additionally:

> The Commonwealth bears the burden of establishing the harmlessness of the error. This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was *de minimis;* or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming

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use). Nevertheless, we need not decide whether Mr. Sandt's letter is non-testimonial or whether it falls within some amorphous gray area of "testimonial" statements, as Appellant contends. Because we have decided the letter was inadmissible on non-constitutional state law grounds, we decline to address Appellant's constitutional claim under ***Crawford. See P.J.S., supra.***

> and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Passmore, 857 A.2d 697, 711 (Pa.Super. 2004), *appeal denied*, 582 Pa. 673, 868 A.2d 1199 (2005) (quoting ***Laich, supra*** at 29, 777 A.2d at 1062-63).

¶ 44 In the instant case, on November 28, 2002, Appellant was advised of her ***Miranda*** rights and submitted to an audio-taped custodial interrogation with two detectives. The transcripts from this interrogation reveal Appellant confessed the following: she had been engaged in a romantic relationship with Mr. Fransen; she told Mr. Fransen that Mr. Sandt treated her poorly; she and Mr. Fransen explored different scenarios, in letters and telephone conversations, that would result in Mr. Sandt's demise, including a staged "hunting accident," "drug overdose," or "suicide"; occasionally, she and Mr. Fransen referred to their plans to get rid of Mr. Sandt as "the mission"; she gave Mr. Fransen Mr. Sandt's .22 caliber revolver; she and Mr. Fransen agreed that, on the night of the murder, Mr. Fransen would "straighten out" Mr. Sandt while Appellant waited in her car; she also agreed to give Mr. Fransen a ride to the end of her driveway; as she sat in her car, she heard "scuffling," followed by several gunshots; she drove Mr. Fransen from the murder scene to the end of her driveway; she disposed of letters written by Mr. Fransen, which discussed harming Mr. Sandt. (Transcript of Interview with Detectives, 11/28/02, R.R. 118a-132a). Appellant freely confessed to how and why Mr. Fransen murdered Mr. Sandt. Appellant's confession unequivocally implicated her in the death of Mr. Sandt.

¶ 45 At trial, the Commonwealth presented ample and otherwise properly admitted evidence regarding the matters asserted in Mr. Sandt's letter. The following chart identifies

where the matters asserted in the letter were presented at trial through independent competent evidence:

Matters asserted in Mr. Sandt's letter	**Matters presented at trial**
Appellant wrote letters to Mr. Fransen, discussing plans to harm Mr. Sandt.	(N.T. Trial, 1/7/04, at 95); (N.T. Trial, 1/8/04, at 82, 86, 88, 90-91); (N.T. Trial, 1/9/04. at 13-16, 47-49) (independent trial testimony regarding Appellant's admissions and love letters to and from Mr. Fransen, retrieved from trash dumpster, at Appellant's direction).
Appellant and Mr. Fransen discussed murdering Mr. Sandt.	(N.T. Trial, 1/7/04, at 96-07, 130) (independent trial testimony regarding Appellant's and Mr. Fransen's plans and options to murder Mr. Sandt without being suspected of murder).
On November 21, 2002, Mr. Fransen visited Mr. Sandt's house at 1:00 A.M., while Appellant was out of town with her mother.	(***Id.*** at 98-99) (independent trial testimony on the subject of Mr. Fransen's, unannounced, late night visit to Mr. Sandt and an account of their conversation).
Mr. Sandt became suspicious about how Mr. Fransen knew the location of his home.	***(Id.*** at 136-138); (N.T. Trial, 1/12/04, at 50-51) (independent trial testimony concerning map drawn by Appellant for Mr. Fransen to help him find Appellant's home without being seen by neighbors).

Mr. Sandt could not find his .22 caliber revolver.	(N.T. Trial, 1/7/04, at 92, 143-44) (independent trial testimony regarding Appellant taking Mr. Sandt's .22 caliber revolver and giving it to Mr. Fransen).

¶ 46 The Commonwealth also presented the hand-drawn map, with detailed notes, that Appellant had prepared for Mr. Fransen. The map and notes advised Mr. Fransen how to locate and access Mr. Sandt's residence while avoiding neighbors, fences, dogs, and security devices, such as motion activated lights. Even without the letter, Appellant's confession and other trial evidence proved Appellant's guilt beyond a reasonable doubt. In other words, Mr. Sandt's letter was merely cumulative of other untainted evidence. ***See Passmore, supra.*** Given the overwhelming evidence of Appellant's guilt, the court's evidentiary ruling to admit the letter was harmless error. ***See West, supra.*** Thus, we decline to disturb the jury's verdict on this basis.

¶ 47 In her second issue, Appellant contends the Commonwealth elicited Appellant's inculpatory statements during a "custodial" interrogation at the police station, before the police administered her ***Miranda*** warnings. The subsequent ***Miranda*** warning cannot cure the defect of the initial interrogation. Specifically, Appellant contends the Commonwealth began a custodial interrogation of Appellant as soon as she arrived at the Stroud Area Regional Police Department Headquarters. Appellant maintains her inculpatory admissions should have been suppressed because the interrogation technique employed by the police—questions first, ***Miranda*** warnings second—violated her constitutional rights. Appellant identifies multiple factors to support her contentions that her initial interaction with the police was custodial, including: (1) when

she first arrived at her home, Appellant was not permitted to enter and was told to remain at her parents' home next door; (2) while at her parents' home, police entered freely and questioned Appellant, and she was told to surrender her clothing to police; (3) upon arrival at the police station, Appellant was the focus of an investigation; (4) the interrogation at the police station occurred with armed detectives in a locked, windowless room; (5) the police would not allow her to leave, thereby extending the duration of Appellant's detention and causing her sleep deprivation. Under these circumstances, Appellant insists her statements and the results thereof were obtained in violation of her constitutionally protected right against self-incrimination, as expressed by Amendment V of the Constitution of the United States. Appellant claims the suppression court committed reversible error when it refused to suppress Appellant's inculpatory statements and the evidence obtained as a result. Appellant concludes the violation of her Constitutional rights warrants a new trial.

¶ 48 In response to Appellant's second issue, the Commonwealth argues the suppression court properly admitted Appellant's statements to police. Appellant went to the police station voluntarily; police advised her that she was not under arrest and could leave at any time; she was not searched; the interview room door remained ajar during the interview; Appellant did not ask to leave. Appellant made the statements after she was informed that she was free to leave. Appellant received ***Miranda*** warnings after she placed herself at the crime scene. Appellant acknowledged her ***Miranda*** rights, waived her right to remain silent and her right to an attorney, and repeated her inculpatory statements. The Commonwealth concludes the non-custodial nature of the initial conversation vitiated any possible taint, and Appellant is not entitled to a new trial on this basis.

¶ 49 Review of the court's decision to deny a suppression motion implicates the following principles:

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Our scope of review is limited:
>
> [W]e may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Jones, 874 A.2d 108, 115 (Pa.Super. 2005) (internal citations and quotation marks omitted).

¶ 50 Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of her ***Miranda*** rights. ***Commonwealth v. DiStefano***, 782 A.2d 574, 579 (Pa.Super. 2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda, supra*** at 444, 86 S.Ct at 1612, 16 L.Ed.2d at 706.

> Whether a person is in custody for ***Miranda*** purposes depends on whether the person is physically [deprived] of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated

> reasonably believes his freedom of action is being restricted.

Commonwealth v. Williams, 539 Pa. 61, 74, 650 A.2d 420, 427 (1994) (internal citations omitted).

> Said another way, police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest.
>
> The factors a court utilizes to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. The fact that a police investigation has focused on a particular individual does not automatically trigger "custody," thus requiring ***Miranda*** warnings.

Commonwealth v. Mannion, 725 A.2d 196, 200 (Pa.Super. 1999) *(en banc)* (internal citations omitted). ***See also Commonwealth v. Peters,*** 642 A.2d 1126, 1130 (Pa.Super. 1994) *(en banc), appeal denied,* 538 Pa. 668, 649 A.2d 670 (1994) (stating fact that defendant was focus of investigation is relevant for custody determination but does not *per se* require ***Miranda*** warnings). Whether a person is in custody for ***Miranda*** purposes must be evaluated on case-by-case basis with due regard for the facts involved. ***Mannion, supra*** at 202.

¶ 51 In the instant case, the trial court explained its decision to deny Appellant's motion to suppress her admissions to police as follows:

> [Appellant] alleges that she was in police custody from sometime in the early morning hours of November 28, 2002 until the time her taped interview was concluded at the Day Street Police Station after 6:00 P.M., on the same day. [Appellant] further alleges that because she was not given the ***Miranda*** warnings until 4:20 P.M., on November 28, 2002, her statements were improperly elicited and should be suppressed at trial.
>
> The fact that a police investigation has focused on a particular individual does not automatically trigger "custody" thus requiring ***Miranda*** warnings. In order to be "in custody," a person must believe that he is not free to leave." Where a defendant does not feel free to leave the interview room during questioning, any confession elicited is done so with the defendant in custody. In ***Commonwealth v. Rodriguez[***, 479 A.2d 558 (Pa.Super. 1984)], the Court held that [an appellant] was not in custody where he voluntarily accompanied the police in an unmarked police car and was left alone in a small interrogation room for thirty-five minutes. The Court concluded that there was no evidence that the door to the interrogation room was locked or that the defendant ever expressed a desire to leave the room.
>
> The facts of ***Rodriguez*** are similar to those of the instant matter. [Appellant] voluntarily went to the police station with her parents. She was placed in an interview room for ten minutes prior to the commencement of questioning. There is conflicting testimony between [Appellant] and Detective Schmidt as to whether the door to the interview room was locked. [Appellant] tes-

tified that she was locked in the room the whole time. Detective Schmidt testified that the door was never even closed. When asked on cross-examination whether she ever complained that the interview room door was locked, [Appellant] stated that she did not because she assumed the police locked it deliberately. [Appellant] admitted that she was told that she was free to leave at any time. We conclude that there is insufficient evidence for a holding that [Appellant] felt she was not free to leave the interview room on November 28, 2002.

In support of her argument, [Appellant] provided the court with a copy of ***Commonwealth v. McCarthy,*** [820 A.2d 757 (Pa.Super. 2003)]. We find that the facts of ***McCarthy*** are substantially different and are distinguishable from the instant matter. The defendant in ***McCarthy,*** unlike [Appellant] in the instant matter, specifically asked to speak to an attorney before answering any questions. The defendant testified that the detective interviewing her responded "no, this is my window of opportunity; and if I walked through that door he would make sure that all the charges stuck and he would embarrass me in front of my friends. That's when I sat down." In the instant matter, there were no such threats made to [Appellant].

[Appellant] also alleges the following in her Omnibus Pre-Trial Motion in regard to the duration of what she terms a detention:

9. [Appellant's] statements were a product of unconstitutional and coercive procedures including sleep deprivation and promises of future treatment.

10. At the time of [Appellant's] statements, she was so deprived of sleep and food that her statement was not knowing and voluntary.

(Omnibus Pre-Trial Motion, March 20, 2003, at 3). In determining voluntariness, the question is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of [her] ability to make a free and unconstrained decision to confess. The totality of the circumstances [is] to be evaluated in determining whether a statement is voluntary. The relevant factors include the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion.

The first issue is whether [Appellant] had been sleep deprived by the police. [Appellant] went to work on November 26, 2002 at 10:00 P.M., and left at 7:00 A.M., on November 27, 2002. She slept from 8:00 A.M., to 12:00 noon [on November 27]. [Appellant] did not sleep again until after the police interview, which commenced at 1:50 P.M., on November 28, 2002. Thus, [Appellant] had not slept in approximately twenty-six hours when she was given the ***Miranda*** warning. However, the fact that [Appellant] had not slept for a long period of time is not determinative of the sleep deprivation issue. We must also determine whether police conduct was the cause of [Appellant's] inability to sleep. Detective Schmidt testified at the omnibus hearing that [Appellant] did not appear tired or confused at the time of the interview on November 28, 2002. [Appellant] testified that she only slept four hours in the forty-three hours prior to the interview. However, [Appellant] did not give any testimony that she was tired during the interview. Furthermore, [Appellant] did not testify that

she ever informed the detectives interviewing her that she was tired. It is apparent that [Appellant's] job puts her on an unusual sleep schedule. [Appellant] works an overnight shift and sleeps during the day. It has not been made clear how long [Appellant] normally goes between sleep. [Appellant] has simply failed to convince this court that she was sleep deprived at the time of the interview. Even if [Appellant] was sleep deprived at the time of the interview, [Appellant] has failed to show that the police prevented her from sleeping while at her parents' house. Furthermore, [Appellant] does not allege that she ever expressed to the police that she needed sleep. Therefore, her statements cannot be suppressed on that ground.

[Appellant] alleges that there were "promises of future treatment" made to her. [Appellant] has failed to give any specific information as to promises that were made to her. Additionally, Detective Schmidt testified at the omnibus hearing that no one made any promises or threats to [Appellant].

[Appellant] also alleges that she was deprived of food at the time of the interview. It is undisputed that [Appellant] was given a hoagie and a soda sometime after 5:00 P.M., on November 28, 2002. This occurred after several hours of questioning and after [Appellant] was ***Mirandized.*** However, [Appellant] has not alleged that she had gone a substantial amount of time without food. The interview did not commence until 1:50 P.M. [Appellant] was at her parents' house from the time she got home in the early morning hours of November 28, until the time they left for the police station at 1:30 P.M. [Appellant] does not allege that she did not have ample opportunity to eat prior to the interview. We conclude that the detectives were not required to offer

[Appellant] food during the mid-afternoon hours of November 28, 2002.

We will now address the six factors set forth by [Appellant] in her brief in support of her argument that a custodial interrogation did take place. The first factor is the basis for the detention. We agree with [Appellant] that she clearly was the focus of the investigation from an early point. However, this by itself does not create the assumption of a custodial interrogation. ***Mannion, supra.***

The second factor is the duration of the detention. [Appellant] argues that the detention began in the early morning hours of November 28, 2002, based on the fact that she was effectively prevented from leaving the crime scene. We disagree. This was a situation in which a reasonable person would believe [she] was "at liberty to ignore the police presence and go about [her] business." ***Commonwealth v. Witherspoon,*** 756 A.2d 677, 680 (Pa.Super. 2000). [Appellant] was in her parents' house and the police investigation focused on [Appellant's] house, not her parent[s'] house. The police did not prevent [Appellant] from going about her business. At no time did [Appellant] attempt to leave her parent[s'] house or even ask if she could leave. She merely was prevented from accessing her car, as it was part of the investigation. We conclude that the interview commenced at the time [Appellant] was brought into the interview room at the police station at 1:50 P.M. [Appellant] was ***Mirandized*** at 4:20 P.M. Thus, [Appellant] was interviewed for only two-and-one-half hours prior to being given the ***Miranda*** warnings.

The third factor concerns the location of the interview. We agree with [Appellant] that the interview was conducted in an interview room at a police station.

The fourth factor concerns how [Appellant] was transported to the police station. [Appellant] argues that she had no choice but to go to the police station and the police had no reason to think that her parents would help her flee. It is undisputed that the police requested [Appellant's] presence at the police station and that the police left the vicinity of the crime scene after making such request. No one prevented [Appellant] from staying at her parent[s'] house or going somewhere other than the police station. Therefore, we conclude that [Appellant] was not coerced into going to the police station on November 28, 2002.

The fifth factor deals with show, threat or use of force. [Appellant] argues that the large police presence at the crime scene prevented her from leaving her parents' house. Mere police presence is insufficient to conclude that coercion took place. "In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." ***Florida v. Bostick,*** 501 U.S. 429, 439, 111 S.Ct. 2382, 2389 [, 115 L.Ed.2d 389, ___] (1991). We find the following facts to be supportive of [Appellant's] argument: (1) [Appellant's] car was boxed in by police cars such that she would have been unable to leave; (2) [Appellant] was not allowed to open her car to retrieve a pack of cigarettes; (3) the police entered and exited [Appellant's] parents' house constantly through the time they were investigating the crime scene; and (4) [Appellant] was requested to turn her clothes over to police. However, neither [Appellant] nor her parents ever

refused to cooperate with police, ever asked the police to leave their house, ever asked the police to move their vehicles, or ever attempted to leave the area. Furthermore, there was no formal interview of [Appellant] during the time she remained in her parent[s'] house. While it is true that the police entered and exited the house many times, [Appellant] was never formally interviewed as to the events of November 27, 2002 until she arrived at the police station on November 28, 2002. In fact, Detective Wolbert testified that [Appellant] was free to go about wherever she wanted at the time of the investigation of the crime scene. Therefore, we conclude that custody did not begin until sometime during the interview of [Appellant] at the police station.

The sixth factor inquires into the methods of investigation used. [Appellant] argues that the interrogation was lengthy and confrontational, with Detectives Miller and Schmidt using police tactics to elicit inculpatory evidence from [Appellant]. [Appellant] does not reference...any specific incidences of police conduct or how such conduct violated any constitutional right.

Finally, we agree with the Commonwealth that even if the police should have ***Mirandized*** [Appellant] at the beginning of the interview, the subsequent issuing of ***Miranda*** warnings[,] coupled with the fact that there is no evidence of coercive or improper police tactics[,] allow the admission of [Appellant's] statements. ***Commonwealth v. DeJesus,*** [567 Pa. 415,] 787 A.2d 394 (2001). The ***DeJesus*** Court held:

[W]e find no merit in Appellant's present claim that the detectives' conduct, which violated ***Miranda,*** tainted and invalidated his subsequent waiver of rights and statement.

° ° °

> The fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of ***Miranda*** warnings should ordinarily suffice to remove the conditions that precluded admission of the earlier statement.
> ***Id.*** at [435-36, 787 A.2d at] 405-6. Thus, even if the pre-***Miranda*** statements made by [Appellant] were the product of a custodial interrogation, they are nonetheless admissible due to the absence of coercion.

(Omnibus Pre-trial Motion Opinion at 6-14) (some internal citations and quotation marks omitted). We accept the trial court's analysis and see no reason to disturb its decision. Appellant voluntarily: (1) remained at her parents' home; (2) went to the police station to speak with police officers; (3) confessed her relationship with Mr. Fransen and her involvement in Mr. Sandt's murder; (4) waived her constitutional right to remain silent and right to an attorney; (5) provided a written statement to police; and (6) supplied an audiotape statement to police. At all times prior to her ***Miranda*** warnings, Appellant enjoyed freedom of action and was not placed in a situation in which she reasonably could have believed that her freedom of action or movement was restricted by police interrogation. ***See Williams, supra.*** Moreover, even if Appellant was subject to a ***Miranda*** violation, she was not inevitably disabled from waiving her rights and confessing after she received the requisite warnings. Therefore, we conclude Appellant's confession was properly admitted at trial.

¶ 52 In her third issue, Appellant argues the nude and semi-nude photographs (of Appellant and Mr. Fransen) were irrelevant in this case. Appellant insists the Commonwealth used the photographs just to inflame the jury's passions. Appellant claims the trial court did not engage in any legal analysis to determine whether the photographs were properly admis-

sible. Instead, Appellant suggests the trial court simply admitted the photographs because it "didn't like [Appellant]." (Appellant's Brief at 40). Appellant concludes the court erred in admitting the photographs, and she is therefore entitled to a new trial.

¶ 53 In response, the Commonwealth claims the photographs depicting Appellant and Mr. Fransen in various states of undress were properly admitted, because they constituted evidence of Appellant's guilty mind. Specifically, Appellant discarded these photographs, along with the couple's love letters, on her way home to the crime scene, after receiving a call from her mother. The Commonwealth asserts Appellant's disposal of these items was evidence of her guilty mind and constituted an effort to cover-up any connection between Appellant and Mr. Fransen. The Commonwealth concludes the trial court properly admitted the photographs into evidence at trial.

¶ 54 Rule 402 of the Pennsylvania Rules of Evidence states: "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. Nevertheless, Rule 403 provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**
>
> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403. In this balancing test for admissibility the question is whether the challenged evidence is so unfairly prejudicial that its inflammatory nature substantially outweighs its probative value. ***Commonwealth v. Peer,*** 684 A.2d 1077 (Pa.Super. 1996).

¶ 55 We employ a two-part test to determine if allegedly inflammatory photographic evidence is admissible. ***Commonwealth v. Hetzel,*** 822 A.2d 747, 765 (Pa.Super. 2003), *appeal denied,* 576 Pa. 711, 839 A.2d 351 (2003). First, assuming the photographs are relevant, the court must decide if the photographs are inflammatory. ***Id.*** If the photographs are not inflammatory, they are admissible. ***Id.*** On the other hand, if the photographs are inflammatory, the court must balance the evidentiary need for the photographs against the likelihood they will inflame the minds and passions of the jurors. ***Id.*** Admission of photographic evidence is proper "where the evidentiary value exceeds the inflammatory danger." ***Id.***

¶ 56 As a prefatory concern, we observe that Pennsylvania Rule of Appellate Procedure 2119 provides, in pertinent part:

> **Rule 2119. Argument**
>
> **(a) General rule.** The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119. Further:

> Rule 2119 contains mandatory provisions regarding the contents of briefs. We have held consistently, "arguments that are not **appropriately** developed are waived."
>
> It is the appellant who has the burden of establishing [her] entitlement to relief by showing that the ruling of the trial court is erroneous under the evidence or the law.

Jones v. Jones, 878 A.2d 86, 91 (Pa.Super. 2005). ***See also Commonwealth v. Franklin,*** 823 A.2d 906, 910 (Pa.Super. 2003).[8]

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[8] The Rules of Appellate Procedure apply to criminal and civil cases alike. ***See Lineberger v. Wyeth,*** 894 A.2d 141, 148 n.4 (Pa.Super 2006) (citing ***Kanter***

¶ 57 Instantly, Appellant's third issue rests solely on the trial court's alleged personal animus toward her. Appellant does not argue why the photographs are irrelevant or inflammatory. ***See Hetzel, supra.*** Additionally, Appellant does not substantiate her assertion with evidence that the trial court based its decision to admit the photographs on its alleged animosity towards Appellant. ***See*** Pa.R.E. 2119(a); ***Hetzel, supra.*** Appellant has not presented a pertinent discussion of her third issue or satisfied her burden to establish her entitlement to relief by showing that the ruling of the trial court was erroneous under the evidence of the case or prevailing law. Further, the record does not support Appellant's conclusory characterization of the court's personal animus toward her. Without more, Appellant's issue does not constitute a valid issue on appeal that warrants full review. ***See Commonwealth v. Miller,*** 721 A.2d 1121, 1124 (Pa.Super. 1998) (refusing to consider merits of issues not properly raised and developed in briefs). Therefore, we decline to give this issue any further attention. ***See*** Pa.R.A.P. 2119(a), ***supra; Miller, supra.***

¶ 58 Based upon the foregoing, we hold: (1) the trial court erred when it admitted the victim's letter at trial, because the letter constitutes hearsay and does not qualify for admission at trial under a recognized exception to the hearsay rule; nevertheless, this evidentiary ruling was harmless error, where otherwise properly admitted evidence overwhelmingly established Appellant's guilt beyond a reasonable doubt; (2) Appellant's confession was admissible because she was not the subject of a custodial interrogation when she initially confessed; and, after receiving her ***Miranda*** warnings and waiving her right to remain silent and right to counsel,

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v. Epstein, 866 A.2d 394, 400 n.6 (Pa.Super. 2004), appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 1048, 163 L.Ed.2d 858 (2006)).

she freely and willingly repeated her confession to police; (3) Appellant's third issue is waived for failure to develop a cognizable or appropriate legal argument on appeal. Accordingly, we affirm.

¶ 59 Judgment of sentence affirmed.

¶ 60 JUDGE JOYCE FILES A CONCURRING OPINION.

¶ 61 JUDGE MUSMANNO FILES A CONCURRING AND DISSENTING OPINION, WHICH JUDGE KLEIN JOINS.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 937 EDA 2004

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERI LYNN LEVANDUSKI, Appellant

Appeal from the Judgment of Sentence entered March 25, 2004, In the Court of Common Pleas of Monroe County Criminal, No. 1519 Criminal 2002

BEFORE: DEL SOLE, P.J., JOYCE, MUSMANNO, LALLY-GREEN, TODD, KLEIN, BENDER, BOWES, AND GANTMAN, JJ.

CONCURRING OPINION BY JOYCE, J.:

¶ 1 Upon my review, I agree with the distinguished Majority's thoughtful disposition of each of Appellant's issues, particularly with the conclusion that Appellant's letter was inadmissible under the state of mind exception to the hearsay rule.

¶ 2 Out-of-court statements are admissible under the state of mind exception to the hearsay rule for two primary reasons: (1) the declarant's state of mind is often impossible to prove in the absence of these statements and (2) statements of the declarant's state of mind are viewed to be reli-

able, as are present sense impressions and excited utterances, due to their spontaneity. ***See*** Packel & Poulin, Pennsylvania Evidence, § 803(3)-1(a). The state of mind exception to the rule against hearsay permits the introduction of out-of-court statements in three particular instances. First, the exception may be used to establish the declarant's state of mind when the declarant's state of mind is at issue. ***Id.*** at § 803(3)-(1)(a)(1); ***Commonwealth v. Auker,*** 545 Pa. 521, 547, 681 A.2d 1305, 1319 (1996); ***Commonwealth v. Riggins,*** 478 Pa. 222, 234, 386 A.2d 520, 526 (1978). A declarant's state of mind is at issue if it is an element of a charge, claim or defense. Packel & Poulin, at § 803(3)-(1)(a)(1). For example, a murder victim's state of mind might be relevant to rebut a defendant's claim of self-defense, accident or suicide, ***see U.S. v. Brown,*** 490 F.2d 758, 780 (1978), or to establish, where the crime of burglary or kidnapping is also charged, that the victim would not have given the defendant permission to enter or would not have gone with the defendant willingly. ***See Commonwealth v. Stallworth,*** 566 Pa. 349, 363, 781 A.2d 110, 118 (2001); ***Auker, supra*** at 547, 681 A.2d at 1319; ***Riggins, supra*** at 234, 386 A.2d at 526. Second, a declarant's out-of-court statement that he intends to perform a particular act in the future may be admissible under this exception to establish that the declarant acted in conformity with his/her expressed intention. Packel & Poulin, at § 803(3)-(1)(a)(2); ***Commonwealth v. Sneeringer,*** 668 A.2d 1167, 1171-72 (Pa. Super. 1995) (holding that murder victim's statements to third parties about her intention to end her relationship with the defendant and to throw him out of the house was admissible under the state of mind exception to show that she acted in conformity with her intention; the fact that the victim ended her relationship with the defendant was probative of his motive). Third, an out-of-court statement of a declarant's memory or belief may

be admitted to prove a fact remembered or believed only if the statement relates to the execution, revocation, identification or terms of the declarant's will. Packel & Poulin, at § 803(3)-1(a)(3); ***see generally Brown***, 490 F.2d at 763 (stating "[i]n general, where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, the evidence must be excluded"). If the state of mind exception permitted the introduction of statements indicating a belief in, or memory of a fact, the state of mind exception would swallow the rule against hearsay. Packel & Poulin, at § 803(3)-(1)(a)(3), citing ***Shepard v. U.S.***, 290 U.S. 96, 105-106 (1933).

¶ 3 In the instant case, the victim's letter refers entirely to his memory of past events (*i.e.* his discovery of two love letters addressed to his wife, his discussion with her about the first letter, his recollection of the letters' contents, his wife's overnight with her mother, his visit with Lenny, his memory of the substance of his discussion with Lenny, his recollection that Lenny wore rubber gloves during his visit, his discussion with his wife after Lenny's visit, his discovery of his missing pistol, and his discussion with his wife regarding the pistol) and to his belief about what these events could mean (*i.e.* Lenny tried to avoid leaving fingerprints and Appellant gave Lenny the gun to murder him). Further, the trial court permitted the Commonwealth to introduce this letter, in its entirety, to circumstantially prove that Lenny and Appellant had a relationship and a motive to kill the victim. Since the letter could only establish the existence of a relationship and a motive if the jury believed the truth of the matter contained therein, the letter constitutes hearsay. Furthermore, the declarations contained in the letter do not qualify under the state of mind exception to the hearsay rule because (1) the victim's state of mind is not at issue in this prosecution; (2) the only

statement of intention in the letter—that the victim would place the love letters with the letter he authored—has no probative value if offered solely to prove that he did just that, and (3) the statements of memory or belief contained in the letter cannot be offered to prove the truth of the matter asserted, namely, that Appellant and Lenny had a relationship and a motive to kill the victim.

¶ 4 Beyond this, I cannot conclude that the declarations contained in the victim's letter could be classified as spontaneous, thereby engendering them with a degree of reliability and trustworthiness. The record reflects that Appellant drafted a lengthy handwritten letter, spanning multiple pages and containing sixty sentences, in which he recounted the relevant events occurring over the course of, at least, twenty-two days. After digesting and synthesizing these events, the victim concluded that his wife and her lover may be plotting his demise. These facts, coupled with the narrative quality of a letter, indicate that the letter was not spontaneous. Rather, it emanated from his reflective faculties.

¶ 5 I write separately, however, to ask the Supreme Court to clarify the existing decisional law on the applicability of the state of mind exception to the hearsay rule, should the opportunity present itself. Although the Majority attempts to distinguish a number of these cases, I am unable to do so. On a number of occasions, our Supreme Court has held that a murder victim's statements, regarding his/her relationship with the appellant, were admissible under the state of mind exception to the rule against hearsay to show the presence of ill-will, malice or motive for the killing. ***See e.g. Stallworth, supra*** (finding that the appellant's threats to the murder victim, which were contained in a PFA petition, were admissible under the state of mind exception to the hearsay rule to establish the appellant's intent or motive for committing the

crime); ***Commonwealth v. Chandler***, 554 Pa. 401, 721 A.2d 1040 (1998) (finding that the trial court properly permitted the Commonwealth to introduce evidence that the murder victim had told a third party about her negative feelings for the appellant and her relationship with him under the state of mind exception because the victim's opinion of the appellant and her marriage to him went to the presence of ill-will, malice or motive for the killing); ***Commonwealth v. Fletcher***, 561 Pa. 266, 750 A.2d 261 (2000) (finding that the murder victim's statement to a third party that the victim had smoked the appellant's crack cocaine was admissible under the state of mind exception to the hearsay rule to show the presence of ill-will, malice, or motive for the killing). Conversely, on other occasions, our Supreme Court has held that the murder victim's statements regarding his/her relationship with the appellant are not admissible because the victim's perception of the state of the relationship is not relevant. ***See Commonwealth v. Laich***, 566 Pa. 19, 777 A.2d 1057 (2001) (finding that the appellant's threats to kill the murder victim if he ever caught her with another man were not admissible under the state of mind exception because the victim's state of mind was irrelevant as to the appellant's degree of guilt); ***Commonwealth v. Thornton***, 494 Pa. 260, 431 A.2d 249 (1981) (finding that the trial court improperly admitted the murder victim's statement to police—that the appellant was after him—because the murder victim's state of mind was not at issue in the case). I respectfully opine that the Supreme Court's clarification of this precedent would aid the bench and bar of this Commonwealth.

¶ 6 Having concluded that the trial court improperly admitted the letter, but that the error was harmless beyond a reasonable doubt, I concur in the esteemed Majority's disposition.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 937 EDA 2004

COMMONWEALTH OF PENNSYLVANIA, Appellee vs. TERI LYNN LEVANDUSKI, Appellant

Appeal from the Judgment of Sentence March 25, 2004 In the Court of Common Pleas of Monroe County Criminal, No. 1519 Criminal 2002

BEFORE: DEL SOLE, P.J., JOYCE, MUSMANNO, LALLY-GREEN, TODD, KLEIN, BENDER, BOWES, AND GANTMAN, JJ.

CONCURRING AND DISSENTING OPINION BY MUSMANNO, J.:

¶ 1 The majority presents an excellent, well-reasoned and cogent analysis of the rule against hearsay, as applied to the letter written by the decedent, Mr. Sandt. I wholeheartedly agree with my esteemed colleague that Mr. Sandt's letter constituted inadmissible hearsay and no exception applied. However, I am constrained to conclude that the improper admission of the letter at trial was not harmless error, beyond a reasonable doubt.

¶ 2 An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. ***Commonwealth v. Chmiel,*** 889 A.2d 501, 528 (Pa. 2005). "If there is a reasonable possibility that the error may have contributed to the verdict, it is not harmless." ***Id.; see Commonwealth v. Story,*** 383 A.2d 155, 164-66 (Pa. 1978) (stating that the factors to be considered in weighing harmlessness of error include (1) whether error was prejudicial, and if so, whether it was *de minimus;* (2) whether erroneously admitted evidence was merely cumulative of other untainted evidence that was substantially similar to erroneously admitted evidence; and (3)

whether evidence of guilt was so overwhelming, as established by properly admitted and uncontradicted evidence, that prejudicial effect of error was insignificant).

¶ 3 At trial, the Commonwealth presented strong evidence of Appellant's involvement in Mr. Sandt's death. However, the prejudicial impact of Mr. Sandt's letter was, in my view, insurmountable. The letter was so damning that there clearly is a reasonable possibility that its improper admission contributed to the verdict. On this basis, I would conclude that the error was not harmless, and accordingly, I would reverse the judgment of sentence and remand for a new trial.

APPENDIX D

J. A33042/04

2005 PA Super 117

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 937 EDA 2004

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERI LYNN LEVANDUSKI, Appellant

Appeal from the Judgment of Sentence entered March 25, 2004, in the Court of Common Pleas, Monroe County, No. 1519 Criminal 2002

BEFORE: STEVENS, KLEIN, JJ., and McEWEN, P.J.E.

OPINION BY McEWEN, P.J.E.:

FILED MARCH 31, 2005

¶ 1 Appellant, Teri Lynn Levanduski, brings this appeal from the judgment of sentence to serve a term of life imprisonment following her conviction by a jury of the charges of murder in the first degree, conspiracy, hindering apprehension, and solicitation. We are constrained to vacate the judgment of sentence and remand the case for a new trial.

¶ 2 The charges against appellant resulted from the homicide on November 27, 2002, of her common-law husband, Robert Sandt, who died as a result of seven .22 caliber gun shot wounds, including five to his head. The body of Mr. Sandt was found by Beverly Levanduski, the mother of appellant, who was also their next door neighbor. At the time of the gruesome discovery appellant was at her place of employment, where Beverly Levanduski called her to tell her of Mr. Sandt's death.

¶ 3 Appellant thereafter left work to return home. When she arrived at her house the police were present and were conducting an on-site investigation. The police would not al-

low appellant into her home but told her to wait in the next door home of her parents. The police obtained search warrants and during the search found, *inter alia,* a ripped-up five page handwritten note in the kitchen trash can. Subsequent investigation revealed that the note had been written by the victim, though the police could not determine the exact time it was written, and the substance of the note was that the victim was suspicious that appellant and her paramour, Leonard Fransen, were conspiring to murder him.

¶ 4 While still on-site, the police questioned appellant briefly, and then asked her to appear at the police station the next day for further questioning. On the following day, November 28, 2002, appellant went to the police station in the company of her parents. The interview of appellant was conducted in a separate room outside the presence of her parents. Police detectives spoke with appellant for more than two hours (1:50 p.m. to 4:20 p.m.) before they gave her ***Miranda*** warnings. She thereafter continued to speak with the police and provided a written statement that implicated her in the murder of Mr. Sandt. As summarized by the trial judge:

> [She] orally waived her right to an attorney and agreed to speak with the detectives. The detectives ***Mirandized*** defendant at that time due to inconsistencies in her statements. At first, defendant denied having an affair with Leonard Fransen (co-defendant). She later admitted to such an affair, and to driving Leonard Fransen to the end of her driveway shortly before the victim was murdered. Defendant further stated that following Fransen's departure from the house, she drove him away from the scene and dropped him off on the side of a road. Subsequent to defendant being read the ***Miranda*** warning, she amended her statement to in-

> clude that she heard a scuffle inside the house, then heard a gunshot, then saw Leonard Fransen exit the house.
>
> At approximately 5:12 p.m., defendant completed a written statement of her version of the events of November 27, 2002. The detectives reviewed the statement and found that some of the information they had elicited during the oral interview was missing. Defendant agreed to a taped interview, which was concluded at 6:13 p.m.

Slip Opinion on Omnibus Pre-Trial Motion, June 16, 2003, Vican, P.J., pp. 3-4. Based upon her statements and other evidence developed during the investigation, appellant and Leonard Fransen were arrested and charged with the murder of Robert Sandt.

¶ 5 Prior to trial, appellant filed (1) a motion to suppress her statements to the police, and (2) a motion in *limine* to preclude the admission into evidence of the letter that was discovered in the trash can during the initial police investigation. The motion to suppress was denied. The motion in *limine* was granted in part and denied in part, since the judge ruled that the content of the letter could not be admitted to prove the truth of the matter asserted therein, but could be admitted as evidence of motive and to show the relationship of the co-defendants. A jury trial ensued,[1] in which counsel for appellant argued[2] that the death of Mr. Sandt was the unfortunate result of an argument between him and her paramour. At the conclusion of the trial appellant was found guilty of, *inter alia,* murder in the first degree, and sentenced to serve a term of life imprisonment. This appeal followed.

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[1] Appellant and her co-defendant were tried separately.

[2] Appellant did not take the stand and offer testimony.

¶ 6 Appellant, in the brief she has filed with this Court, presents the following questions to be resolved on appeal:[3]

> Whether the trial court committed reversible error by allowing the Commonwealth to introduce into evidence a letter written by the decedent?
>
> Whether the trial court erred in refusing to suppress statements, and the fruits thereof, that were obtained by the police from appellant while she was in custody?
>
> Whether the trial court committed reversible error by allowing the Commonwealth to introduce into evidence certain photographs of appellant and of the co-defendant?

¶ 7 Appellant first claims that the trial court erred in its ruling on her motion in *limine*. Appellant in that motion sought to preclude the admission into evidence of the victim's letter, which was retrieved from the kitchen trash can, and in which he describes his suspicions regarding appellant's intentions toward him. The law and standards governing our review of this issue provide:

> "A motion in *limine is* a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." ***Commonwealth v. Johnson,*** 582 A.2d 336, 337 (Pa.Super. 1990), ***aff'd,*** 534 Pa. 51, 626 A.2d 514 (1993). Such a ruling is similar to that upon a motion to suppress evidence. ***Commonwealth v. Gordon,*** 543 Pa. 513, 517, 673 A.2d 866, 868 (1996). ... [W]e apply an evidentiary abuse of discretion standard to the denial of a motion in *limine*. ***Commonwealth v. Chmiel,*** 558 Pa. 478, 493,

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[3] We have re-stated the questions for review in order to comply with the mandate that such questions be stated "in the briefest and most general terms, without names, dates, amounts or particulars of any kind." Pa.R.A.P. 2116(a).

738 A.2d 406, 414 (1999) [***cert. denied,*** 528 U.S. 1131, 120 S.Ct. 970, 145 L.Ed.2d 841 (2000)].

> Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court's decision on such a question absent a clear abuse of discretion. ***Commonwealth v. Weber,*** 549 Pa. 430, 436, 701 A.2d 531, 534 (1997).

Commonwealth v. Zugay, 745 A.2d 639, 644-645 (Pa.Super. 2000), ***appeal denied,*** 568 Pa. 662, 795 A.2d 976 (2000). An abuse of discretion has been defined as

> the overriding or misapplication of law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence or the record.

Commonwealth v. Viera, 659 A.2d 1024, 1028 (Pa.Super. 1995), ***appeal denied,*** 543 Pa. 713, 672 A.2d 307 (1996), *citing* ***Commonwealth v. Kubiac,*** 550 A.2d 219, 223 (Pa.Super. 1988), ***appeal denied,*** 522 Pa. 611, 562 A.2d 496 (1989).

¶ 8 The letter in question was lengthy, consisting of five handwritten pages, and described how the victim had discovered that appellant was having a sexual relationship with the co-defendant, and further stated:

> I am writing this letter to tell someone that in [a] letter she said that some how [sic] they had to get rid of me so they could be together.
>
> ° ° ° °
>
> So Saturday I went to get my 22 pistol and it was gone. ... So I am thinking that maybe she [appellant] gave him [co-defendant] the gun to kill me with. That way no one would think some one killed me, that I committed suicide. Seeing it was my gun.

> So that['s] why I am writing this letter in case I should end up shot by a 22 pistol. So nobody would think it was nothing but a suicide. ...

Commonwealth Exhibit Nos. 28 A-B. In deciding that this letter could be admitted for a limited purpose the trial judge ruled in relevant part:

> Defendant's [appellant's] Motion In *Limine* to exclude the letter from the victim is GRANTED to the extent that it may not be used as evidence of defendant's guilt; however, the letter may be used as evidence for other purposes.

Order of June 16, 2003, Vican, P.J. The trial judge, in support of his ruling, offered the following rationale:

> The letter written by the victim, which implicated defendants Levanduski and Fransen, meets this definition [of hearsay]. It was not made by the victim through testimony at a trial or hearing and it is being offered to prove that defendant Levanduski conspired to kill him. Because the letter does not fall within any exception to the hearsay rule, it is inadmissible at trial prove defendant Levanduski's involvement in the murder of the victim.
>
> However, "when an extrajudicial statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule." ***Commonwealth v. Puksar,*** 740 A.2d 219, 225 (Pa. 1999), *citing* ***Commonwealth v. Griffin,*** 515 A.2d 865, 870 (Pa. 1986). Extrajudicial statements are "admissible to establish ill-will or motive where they are not being offered for the truth of the matter contained therein." ***Id.,*** *citing* ***Commonwealth v. Brown,*** 648 A.2d 1177, 1182 (Pa. 1994). Therefore, we conclude that the letter written by the victim is admissible as evidence of a prior relationship between defendants

> Levanduski and Fransen. Furthermore, this letter is admissible as evidence of Defendant Levanduski's motive to cause harm to the victim based on her relationship with another man and her allegations of the victim's abusive conduct towards her.

Slip Opinion, June 16, 2003, Vican, P.J., pp. 17-18.

¶ 9 We are unable, however, to accept this rationale, since the conclusion is inescapable that the contents of the letter, which provided (1) evidence of the relationship between the co-defendants, (2) evidence of appellant's motive, and (3) a link to the possible murder weapon, depended for its relevance upon the jury believing the content of the letter—in other words, the truth of the matter asserted. This situation is analogous to that addressed by the Pennsylvania Supreme Court in ***Commonwealth v. Thornton,*** 494 Pa. 260, 431 A.2d 248 (1981), where the Commonwealth sought to present to the jury the victim's statement that the defendant was "after him" so as to demonstrate that the victim feared the defendant. The Supreme Court concluded that the victim's statement was hearsay, holding:

> It is true that the declaration perhaps tends to establish that the victim, Moore, was fearful of the Thorntons. However, the victim's state of mind was not a matter in issue in the case. It was appellant's state of mind, not that of the victim, which was material to establish the degree of guilt, if any, on the charge of criminal homicide. ***Cf. Commonwealth v. Stewart, supra*** (evidence of gang activity relevant to defendant's state of mind).
>
> Only when the declaration is considered for the truth of the matter asserted, that appellant and his brother "were after" the victim, does the declaration become relevant, that is, both material to and probative of appellant's intent to kill. However, when considered

> for its substantive truth, the declaration, although relevant, is incompetent and hence inadmissible because it is hearsay not within any exception. Thus appellant's objection to admission of the declaration should have been sustained and the testimony excluded.

Commonwealth v. Thornton, supra, 494 Pa. at 265, 431 A.2d at 251. Similarly, in the present case, despite the thoughtful analysis of the trial judge, the content of the letter ***was*** only relevant for the truth of what it described, and hence was within the hearsay rule restrictions.[4]

¶ 10 This is not the end of our inquiry, however, since as an appellate forum, we may affirm the evidentiary ruling of the trial court if there is a basis in the record to do so. ***Commonwealth v. Harper,*** 611 A.2d 1211, 1213 n.1 (Pa.Super. 1992). Therefore, we proceed to examine the question of whether the content of the letter was admissible because it was within a recognized exception to the hearsay rule. ***See: Heddings v. Steele,*** 514 Pa. 569, 574, 526 A.2d 349, 352 (1987).

¶ 11 The Commonwealth in its brief argues that the content of the letter was admissible under one of two exceptions:[5] Rule 803(3), the then existing mental, emotional, or physical

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[4] The rule against hearsay is a rule of exclusion, *i.e.*, hearsay is generally not admissible. As our Supreme Court has recited:

> A hearsay statement lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence. Perhaps such a statement's most telling deficiency is it cannot be tested by cross-examination. According to Dean Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, ***supra,*** § 1367. Nor is the declarant under oath when the out of court statement is uttered. This court has long recognized the oath requirement as a further assurance of reliability.

Heddings v. Steele, 514 Pa. 569, 573, 526 A.2d 349, 351 (1987).

[5] The Commonwealth also sought to justify admission of the content of this statement on grounds of "*res gestae*", which is not, under the Pennsylvania Rules

condition exception, or Rule 804(b)(6), the forfeiture by wrongdoing exception.

¶ 12 Rule 803(3) defines the state of mind exception as applicable to "statement[s] of the ***declarant's*** then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health." Pa.R.E. 803(3) (emphasis supplied). The content of the letter in this case was clearly not being offered to establish the declarant's "intent, plan or motive" as described in Rule 803(3), but was introduced as evidence of the "intent, plan or motive" of another, specifically appellant. ***See: Commonwealth v. Laich,*** 566 Pa. 19, 27-28, 777 A.2d 1057, 1061-1062 (2001) (Supreme Court held that the state of mind of the declarant victim regarding defendant's intent to kill her was inadmissible). ***See also: Commonwealth v. Thornton, supra,*** (victim's statement that defendant and his brother were "after him" was held to be inadmissible); ***Ohlbaum on The Pennsylvania Rules of Evidence,*** § 803.3[13], p. 638 (2004-2005 Ed.) ("[A] witness's statement as to her fear or intent or her explanation for the defendant's behavior may well express

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of Evidence, an exception to the bar against hearsay. Since the adoption in 1998 of a "comprehensive code of evidence," the only applicable exceptions are those specified therein, unless otherwise provided for by the Pennsylvania Supreme Court or General Assembly. ***See:*** Pa.R.E. 101, Comment; 802, Comment. ***See also: Wigmore on Evidence,*** § 1767, p. 255 (1976) ("The phrase *res gestae* has long been not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both."). Moreover, the case relied upon by the Commonwealth, ***Commonwealth v. Paddy,*** 569 Pa. 47, 800 A.2d 294 (2002), reviewed the concept of res *gestae* as part of a discussion upon the admissibility of the prior criminal acts of a witness, ***see:*** Pa.R.E. 404(b), and specifically held that such evidence would nonetheless be inadmissible "if it violates a rule of competency, such as the hearsay rule." ***Commonwealth v. Paddy, supra,*** 569 Pa. at 70, 800 A.2d at 308.

her state of mind but is inadmissible to establish the defendant's state of mind or motive unless the statements were communicated to the defendant."). ***Compare: Commonwealth v. Sneeringer,*** 668 A.2d 1167 (Pa.Super. 1995), ***appeal denied,*** 545 Pa. 651, 680 A.2d 1161 (1996) (victim's statement of intent to end relationship was admissible). Thus, the handwritten letter of the victim did not fit within the Rule 803(3) exception, and we will turn our attention to whether the letter was admissible under the Rule 804(b)(6) exception.[6]

¶ 13 That relatively new exception, known as the "forfeiture" exception, is described in the Rule as applying to "statement[s] offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Pa.R.E. 804(b)(6).[7]

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[6] Our learned colleague, Judge Correale Stevens, relies in dissent upon ***Commonwealth v. Chandler,*** 554 Pa. 401, 721 A.2d 1040 (1998), and ***Commonwealth v. Sneeringer,*** 668 A.2d 1167 (Pa.Super. 1995), ***appeal denied,*** 545 Pa. 651, 680 A.2d 1161 (1996) in support of his argument that the letter of the victim should have been admitted. However, in those cases, the statements of the victims were limited to the victim's negative opinion of the defendant ***(Chandler)*** or the victim's intention to carry out an action ***(Sneeringer),*** as distinguished from the present case where the statement expresses an opinion about the likelihood of future conduct by the defendant. Moreover, we feel constrained by the later decision of the Pennsylvania Supreme Court in ***Commonwealth v. Laich,*** 566 Pa. 19, 777 A.2d 1057 (2001), to conclude that the content of the proffered letter does not satisfy the "state of mind" exception of Pa.R.E. 803(3).

[7] The recent ruling of the United States Supreme Court in the matter of ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which was specifically addressed by the trial judge in his Supplemental Opinion, bears comment. In ***Crawford,*** the Court specifically overruled its prior decision in ***Ohio v. Roberts,*** 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and held that when "testimonial statements" are at issue, the Confrontation Clause of the United States Constitution precludes the use of hearsay except in the most limited of circumstances. This new rule, however, does not apply to non-testimonial statements, and although the Supreme Court did not specifically define the terms testimonial and non-testimonial, it made clear that when it referred to "testimonial" statements it was referring to statements made by a declarant who at the

¶ 14 This Court, in ***Commonwealth v. Santiago,*** 822 A.2d 716, 731 (Pa.Super. 2003), ***appeal denied,*** 577 Pa. 679, 843 A.2d 1237 (2004), ***cert. denied,*** ___ U.S. ___, 124 S.Ct. 2916, 159 L.Ed.2d 820 (2004), imposed a strict interpretation on the rule when we held that it required a finding that the party against whom the statement is offered must have "acted wrongfully and that ***the wrongful conduct was intended to, and did in fact, procure the unavailability of the declarant as a witness.***" ***Id.*** at 731 (emphasis supplied). This view is consistent with that expressed by the Pennsylvania Supreme Court in ***Commonwealth v. Laich, supra.***[8] Consequently, since there is no basis in the record upon which to suggest that appellant killed the victim to prevent him from

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time of making the statement would "reasonably expect that the statement might be used in future judicial proceedings." ***United States v. Saget,*** 377 F.3d 223, 228 (2nd Cir. 2004). Thus, we agree with the astute analysis provided by the distinguished President Judge Ronald E. Vican that the letter at issue here was "nontestimonial in nature because it was not given under oath or affirmation at trial or in an affidavit or deposition ... [and is not] barred by ***Crawford,*** rather governed by the Pennsylvania Rules of Evidence ... ." Slip Opinion, June 2, 2004, Vican, P.J., p. 3.

[8]The discussion by the Supreme Court in ***Laich,*** was in the nature of *obiter dictum,* since the trial in that case took place before the effective date of the Rule. Nevertheless, the Court provided the following cogent analysis:

> It is clear from the language of the exception that the exception only applies when a party's wrongdoing is done with the intention of making the declarant unavailable to testify as a witness. See 30B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 7078 (INTERIM ED.)("Rule 804(b)(6) is an attempt to respond to the problem of witness intimidation[.]") If a party's wrongdoing was for another purpose, e.g., killing the declarant based upon personal animosity, the exception does not apply. The dissent's reliance on a line of federal cases applying the federal forfeiture by wrongdoing exception, which is identical to Pennsylvania's exception, is misplaced since those cases involved wrongdoing that was intended to prevent a declarant from testifying. None of the cases applied the exception in circumstances where the wrongdoing was not intended to procure a declarant's unavailability for trial, such as in the instant case.

Commonwealth v. Laich, 566 Pa. 19, 28 n.4, 777 A.2d 1057, 1062 n.4 (2001).

testifying, there is no basis upon which to find that the victim's statement was admissible under this exception.[9] ***Cf: United States v. Emery,*** 186 F.3d 921, 926 (8th Cir. 1999), ***cert denied,*** 528 U.S. 1130, 120 S.Ct. 968, 145 L.Ed.2d 839 (2000) ("The rule contains no limitation on the subject matter of the statements that it exempts from the prohibition on hearsay evidence. Instead, it establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness.").

¶ 15 In our view, the only remaining exception that has the hue of relevance to our discussion is the "dying declaration" exception as set out in Pennsylvania Rule of Evidence 804(b)(2). This exception permits the admission into evidence of "statement[s] made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Pa.R.E. 804(b)(2). This Court, in ***Commonwealth v. Griffin,*** 684 A.2d 589 (Pa.Super. 1996), per our esteemed colleague Judge Berle M. Schiller,[10] summarized the hallmarks of this exception:

> A statement may be considered a dying declaration, and hence admissible notwithstanding its hearsay attributes, if the declarant identifies his attacker, the declarant believes he is going to die, that death is immi-

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[9] In arriving at this conclusion, however, we are mindful of the insightful misgivings of Justice Castille in his dissent in ***Commonwealth v. Laich:***

> There is something deeply offensive about the notion that one can murder another and then object to admission of the victim's statements on the ground that the witness is "unavailable" for confrontation at trial.

Id. at 39, 777 A.2d at 1069 (Castille, J., dissenting).

[10] Judge Schiller now graces the United States District Court for the Eastern District of Pennsylvania.

nent, and death actually results. ***Commonwealth v. Frederick,*** 508 Pa. 527, 531, 498 A.2d 1322, 1324 (1985). ***Commonwealth v. Griffin, supra*** at 592 (footnote omitted).

¶ 16 The Pennsylvania Supreme Court, in ***Commonwealth v. Perry,*** 364 Pa. 537, 73 A.2d 425 (1950), defined the limited circumstances in which this exception applies:

> Dying declarations are restricted to the circumstances immediately attending the homicide; they are not admissible if they relate to former and distinct transactions and embrace facts or circumstances not immediately illustrating or connected with the declarant's death: ***Commonwealth v. Spahr,*** 211 Pa. 542, 543, 60 A. 1084, 1085. To be admissible they must recite only facts to which the declarant would have been allowed to testify if on the witness stand under oath; ***therefore they must be based on the declarant's observations and not be merely expressions of opinion which are the result of reflection or reasoning upon matters preceding the murder. Commonwealth v. Fugmann,*** 330 Pa. 4, 16, 17, 198 A. 99, 106.

Commonwealth v. Perry, supra, at 539-540, 73 A.2d at 426-427 (emphasis supplied), *cited with approval in* ***Commonwealth v. Miller,*** 490 Pa. 457, 471, 417 A.2d 128, 135 (1980), ***cert. denied,*** 449 U.S. 1113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981). The rationale underlying the dying declaration exception has been well stated:

> The reliability of a dying declaration is provided not by an oath, nor by cross-examination; rather, its admissibility is based on the premise that no one "who is immediately going into the presence of his Maker will do so with a lie upon his lips." Lush, L. J., *Regina v. Osman,* 15 Cox C.C. 1, 3 (Eng. 1881). Consistent with that premise, we have stated that: "... before declarations of a deceased

> may be admitted as dying declarations, the evidence must, *inter alia*, justify the conclusion that at the time the statements were made, the declarant believed he was in fact dying, and also that death was imminent."

Commonwealth v. Smith, 454 Pa. 515, 517-518, 314 A.2d 224, 225 (1973), *cited with approval in* ***Commonwealth v. Griffin, supra.*** Thus, the mere fact of a declarant's death is not enough to transform a statement into a "dying declaration" and thereby except the statement from the hearsay rule. ***Commonwealth v. Little***, 469 Pa. 83, 90, 364 A.2d 915, 918 (1976).

¶ 17 We, therefore, have no hesitancy in concluding that this letter, which was written by the victim at an undisclosed time before his death and then discarded, and which only expressed an opinion, as opposed to observed facts, does not fit within the narrow exception of a dying declaration.

¶ 18 Consequently, since the content of this letter depended for its relevance upon the truth of the statements being accepted, it was hearsay, and since it did not fit within any codified or statutory exception,[11] we are compelled to the conclusion that the denial of appellant's motion in *limine*, and refusal of the court to preclude admission of the letter into evidence, constituted reversible error, and a new trial is warranted.[12]

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[11] We note that the Pennsylvania Supreme Court has granted allowance of appeal in the case of ***Commonwealth v. Raab***, 845 A.2d 874 (Pa.Super. 2004), ***allowance of appeal granted***, ___ Pa. ___, 860 A.2d 123 (2004), to consider the question of whether the federal "residual" exception to the hearsay rule, F.R.E. 807, should become the law of Pennsylvania.

[12] As with any claim of error arising from an evidentiary ruling we must consider the question of prejudice. The well-established standard for gauging prejudice is that of "harmless error" as defined in the landmark Supreme Court decision in ***Commonwealth v. Story***, 476 Pa. 391, 405-406, 383 A.2d 155, 162 (1978). It may not be disputed that the letter was inculpatory [sic] on its face. Moreover, the Commonwealth relied upon the contested letter to rebut appellant's defense

¶ 19 While we have concluded that appellant is entitled to a new trial, we nonetheless address her remaining contentions, since they are likely to affect the subsequent trial in this case.

¶ 20 Appellant contends that the trial court erred in denying her motion to suppress and, in support thereof, makes the following argument:

> It is the appellant's position that the custodial interrogation began in the early afternoon hours of November 28, 2002, when [appellant] arrived at the Stroud Regional Police Department Headquarters on Day Street in East Stroudsburg and was subjected to 2 1/2 hours of extensive questioning in the absence of the administration of ***Miranda*** rights, thereby rendering her statement and the fruits thereof inadmissible at time of trial due to a violation of her constitutional right against self-incrimination as guaranteed by Amendment V of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

Brief of Appellant, pp. 23-24.

¶ 21 Our task, in reviewing the ruling of a suppression court, is to determine whether the factual findings are supported by the record. ***Commonwealth v. Malloy,*** ___Pa. ___, ___, 856 A.2d 767, 777 (2004). In making the determination as to whether the factual findings support the suppression court's ruling our standard of review is quite narrow. As the prevailing party below, the Commonwealth is entitled

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theory that the murder of Mr. Sandt was the unfortunate outcome of a fight between the victim and the co-defendant that got out of control, and that she did not have the specific intent to commit first degree murder. ***See: Commonwealth v. Laich, supra,*** 566 Pa. at 29-31, 777 A.2d at 1062-1064. Finally, it bears mention that the Commonwealth offers no argument on the issue of prejudice.

to all favorable inferences and "we only consider the evidence of the prosecution and so much of the evidence of the defense evidence that remains uncontradicted." ***Id. See also: Commonwealth v. Johnson,*** 734 A.2d 864, 869 (Pa.Super. 1999), ***appeal denied,*** 560 Pa. 721, 745 A.2d 1219 (1999). And of course, upon review of a suppression ruling, we are not free to revisit credibility rulings. ***Commonwealth v. Fletcher,*** 561 Pa. 266, 281, 750 A.2d 261, 269 (1998), ***cert. denied,*** 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000).

¶ 22 The law governing an inquiry into a claim that a person has waived ***Miranda*** rights has been well summarized by the Pennsylvania Supreme Court:

> A defendant may waive his ***Miranda*** rights, and agree to answer questions or make a statement. ***Miranda,*** 384 U.S. at 479. For a waiver to be valid, it must be knowing, voluntary, and intelligent. ***Id.*** at 444. In other words, the waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." ***Colorado v. Spring,*** 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) *(quoting* ***Fare v. Michael C.,*** 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L.Ed.2d 197 (1979)).
>
> The test for determining the voluntariness of a confession and the validity of a waiver looks to the totality of the circumstances surrounding the giving of the confession. ***Commonwealth v. Jones,*** 546 Pa. 161, 683 A.2d 1181, 1189 (1996). Some of the factors to be considered include: the duration and means of interrogation; the defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other fac-

tors which may serve to drain one's powers of resistance to suggestion and coercion. ***Id.***

Commonwealth v. DeJesus, 567 Pa. 415, 429-430, 787 A.2d 394, 402-403 (2002), ***cert. denied,*** 537 U.S. 1028, 123 S.Ct. 580, 154 L.Ed.2d 441 (2002).

¶ 23 Although appellant offers a variety of allegations, from sleep deprivation to hunger, in support of her claim that she was subjected to a coercive custodial interrogation, she cannot rebut the finding of the suppression court, based upon her own testimony, that she was advised at the beginning of the police station interview that she was free to leave the police station at any time, and that she never expressed a desire to do so.[13] ***See: Commonwealth v. Boczkowski,*** 577 Pa. 421, 446-449, 846 A.2d 75, 89-92 (2004). Similarly, the record supports the finding of the trial judge that the written confession was provided by appellant ***after*** she had been given her ***Miranda*** warnings. In light of the decision of the Pennsylvania Supreme Court that an initial statement, "although the subject of a ***Miranda*** violation", can nonetheless be considered "voluntary" when coupled with a subsequent confession provided after ***Miranda*** warnings have been given,[14] ***Com-***

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[13] The allegations of sleep and food deprivation are founded upon appellant's assertions that prior to her arrival at the police station she had not eaten and had only slept "four hours out of the previous 43 up to when" she gave her taped statement. N.T. April 15, 2003, p. 79. However, we agree with the analysis of the trial court that, since appellant was not in police custody for the majority of that time but was in fact in the home of her parents, whether she ate or slept prior to her arrival at the police station was not related to any police conduct, and therefore could not be the basis of a finding of coercion on the part of the police. ***See:*** Slip Opinion on Omnibus Pre-Trial Motion, June 16, 2003, Vican, P.J., pp. 8-10.

[14] In arriving at this conclusion the Pennsylvania Supreme Court relied upon the guidance proffered by the United States Supreme Court:

> The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements.

monwealth v. DeJesus, supra, 567 Pa. at 436, 787 A.2d at 406, we must reject her argument.[15]

¶ 24 Finally, appellant claims that the trial court erred in allowing the Commonwealth to present into evidence a packet of eighteen photographs that contained four semi-nude photographs of appellant and two nude photographs of the co-defendant, Leonard Fransen. The Commonwealth had offered these photographs to prove the intimate nature of the relationship between the co-defendants.[16] The pictures were posed personal photographs and did not depict any sexual acts.

¶ 25 The Pennsylvania Rules of Evidence provide that "[a]ll relevant evidence is admissible, except as otherwise provided by law." Pa.R.E. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. ***See: Commonwealth v. Stallworth,*** 566 Pa.

The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. [***Oregon v. Elstad,*** 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).]

Commonwealth v. DeJesus, 567 Pa. 415, 436, 787 A.2d 394, 406 (2002), ***cert. denied,*** 537 U.S. 1028, 123 S.Ct. 580, 154 L.Ed.2d 441 (2002).

[15] We find no merit to appellant's contention that the recent decision of the United States Supreme Court in ***Missouri v. Seibert,*** ___ U.S. ___, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), requires a different result. There, a plurality of the Court opined that where the investigating officers intentionally withheld ***Miranda*** during a "question-first" interrogation, and then used the information obtained therein to interrogate the defendant after warnings were given, the right of the defendant had been violated. Here, however, there was no evidence of police design to evade the strictures of ***Miranda,*** nor was appellant arrested at the time of the initial interrogation. ***See: Reinert v. Larkins*** 379 F.3d. 76 (3rd Cir. 2004); ***United States v. Long Tong Kiam,*** 343 F.Supp.2d 398 (E.D.Pa. 2004) (***Seibert*** "rule" applies only when intentional police misconduct is involved).

[16] The photographs were recovered by the police from a dumpster where appellant had attempted to dispose of them after she heard of the victim's death.

349, 363, 781 A.2d 110, 117 (2001) ("Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.").

¶ 26 The trial judge, in considering whether to allow the introduction of photographs, must "determine whether the evidentiary value of the photos outweighs the possibility that they will inflame the minds and passions of the jurors." ***Commonwealth v. Begley,*** 566 Pa. 239, 268, 780 A.2d 605, 622 (2001). Moreover, the admission of photographs is a matter resting with the discretion of the trial court. ***Commonwealth v. Woods,*** 454 Pa. 250, 252, 311 A.2d 582, 583 (1973), *cited with approval in* ***Commonwealth v. Tharp,*** 574 Pa. 202, 221, 830 A.2d 519, 530 (2003), ***cert. denied,*** ___ U.S. ___, 124 S.Ct. 2161, 158 L.Ed.2d 736 (2004). Here, the trial judge found that these contested photos were relevant, and admitted them "because of the nature of these charges and the conspiracy charges." N.T. January 8, 2004, p. 93.

¶ 27 Appellant has not specifically argued that the decision of the trial court to admit these photographs constituted an abuse of discretion, but rather that the trial judge admitted these photographs out of personal animus towards her.[17] This assertion does not find support in the record, and such a cursory claim does not present such a cogent argument as would warrant full review. ***Commonwealth v. Irby,*** 700 A.2d 463 (Pa.Super. 1997). Were we to review the issue, however, we would find no basis upon which to disturb this exercise of discretion by the trial judge.[18]

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[17] Appellant contends in relevant part, "It is clear that the trial court didn't like the defendant and didn't properly engage in the legal analysis required for the introduction of the photographs." Brief of Appellant pp. 32-33.

[18] The Commonwealth did not place particular emphasis on these photographs in the presentation of its case, or in its argument to the jury. ***See:*** N.T. January 8, 2004 pp. 92-94.

¶ 28 Judgment of sentence vacated. Case remanded for proceedings consistent with this Opinion. Jurisdiction relinquished.

¶ 29 STEVENS, J., FILES A DISSENTING OPINION.

Judgment Entered.
/s/Illegible
Prothonotary
Date: _____

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 937 EDA 2004

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERI LYNN LEVANDUSKI, Appellant

Appeal from the Judgment of Sentence March 25, 2004 in the Court of Common Pleas of Monroe County Criminal at No.: 1519 Criminal 2002

BEFORE: STEVENS, J., KLEIN, J., and McEWEN, P.J.E.

DISSENTING OPINION BY STEVENS, J.:

FILED MARCH 31, 2005

¶ 1 I agree with the majority that the trial court committed no error when it refused to suppress Appellant's statements while under interrogation or when it allowed the Commonwealth to introduce certain photographs into evidence. However, the majority vacates the judgment and remands for a new trial, finding that the admission of a letter by the victim was inadmissible. With that conclusion I respectfully disagree.

¶ 2 I would find that the victim's letter was not hearsay because it was properly admitted as evidence of an extramarital affair. Even if the letter is hearsay, it is admissible to show motive under the state of mind exception. I would therefore find that the trial court did not abuse its discretion and, be-

cause I would affirm the judgments of sentence, I must respectfully dissent.[19]

¶ 3 The majority relies heavily on ***Commonwealth v. Thornton,*** 494 Pa. 260, 431 A.2d 248 (1981), in finding that the victim's letter should have been suppressed. In ***Thornton,*** the Commonwealth sought to admit an oral statement by a murder victim that he was carrying a gun for protection because he was fearful of the defendant. ***Thornton,*** 494 Pa. at 265, 431 A.2d at 251. The Commonwealth argued that the statement was admissible because it established the victim's fear and thus came within the "state of mind" hearsay exception. ***Id.*** The Supreme Court found that an inquiry into the victim's state of mind was irrelevant to establish the defendant's degree of guilt. **Id.** The Supreme Court also found that the statement could be relevant only if it was considered for the truth of the matter asserted that the defendant was "after" the victim. **Id.**

¶ 4 ***Thornton*** establishes that a statement is inadmissible hearsay *only* if there is no other relevant reason to admit the statement other than for the truth of the matter asserted. The majority, without explaining its reasoning, states that the content of the letter was relevant only "for the truth of what it described." Majority Opinion at 8. Specifically, the majority does not address the trial court's opinion that the letter was admissible as evidence of a prior relationship between Appellant and a co-defendant. Trial Court Opinion, Filed 6/16/03, at 18.

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[19] I would note that Appellant failed to include a copy of his Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal and thus violated Pa.R.A.P. 2111(a)(10). However, because Appellant otherwise identifies the specific issues for review, Appellant's failure to comply does not impede our ability to review the issue and thus it is not necessary to find Appellant's arguments waived. ***Commonwealth v. Long,*** 786 A.2d 237, 239 n.3 (Pa.Super. 2001).

¶ 5 In ***Thornton*** the Commonwealth argued that the statement was admissible for only one reason: because the statement established the victim's state of mind. In the within case, the Commonwealth did not make such an argument. Rather, the Commonwealth argues that the letter is not hearsay if it is limited to proof of the relationship between Appellant and the co-defendant and for proof of Appellant's motive. The trial court's ruling, that the letter is admissible subject to such limitations, is proper. Although Appellant argues that admitting the letter as "proof of the relationship" would be cumulative, I see no evidence in the record before us that Appellant made such an argument to the trial court. As a result, I would consider Appellant's cumulative evidence argument waived. ***See Commonwealth v. Ferri,*** 599 A.2d 208, 214 (Pa.Super. 1991) (stating that this Court's review of a cumulative evidence argument is whether the trial court abused its discretion in finding that the evidence was not cumulative).

¶ 6 Even if we were to consider the letter cumulative to the effect of proving the affair between Appellant and her co-defendant, ***Thornton*** is not controlling. ***Thornton*** establishes that a declaration is not admissible hearsay if offered only to prove the immaterial issue of the victim's state of mind. ***Thornton,*** 494 Pa. at 265, 431 A.2d at 251. However, as the Pennsylvania Supreme Court stated in ***Commonwealth v. Chandler,*** a murder victim's statement of opinion regarding her relationship to her spouse is admissible to establish "the presence of ill will, malice, or motive for the killing." ***Commonwealth v. Chandler,*** 554 Pa. 401, 411, 721 A.2d 1040, 1045 (1998). ***See also Commonwealth v. Sneeringer,*** 668 A.2d 1167, 1171-72 (Pa.Super. 1995) (finding that a victim's statement regarding the breakdown of her relationship with the defendant was admissible to prove ill will, motive, or mal-

ice and fell under the "state of mind" exception because it "allow[ed] the jury to infer appellant's motive from such a revelation.").[20]

¶ 7 In order to determine if ***Thornton*** is distinguishable from the within case, we must consider the facts at issue in ***Thornton.*** The appellant was accused and convicted of homicide. ***Thornton,*** 494 Pa. at 262, 431 A.2d at 249. The appellant objected to a witness's testimony regarding statements by the victim. ***Thornton,*** 494 Pa. at 264-65, 431 A.2d at 250-51. The witness stated that the victim claimed to be carrying a gun for protection from the appellant because the victim claimed that the appellant was "after him."[21] ***Id.*** The Pennsylvania Supreme Court determined that the statement established that the victim was fearful of the appellant, but that it did not establish the appellant's state of mind. ***Id.***

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[20] The majority, in addressing ***Chandler*** and ***Sneeringer,*** distinguishes those cases from the within case by explaining that the disputed evidence in ***Chandler*** was limited to the victim's negative opinion of the defendant and that the disputed evidence in ***Sneeringer*** was limited to the victim's intent to "get appellant out of her life." Majority Opinion at 11 n.6 (citing ***Chandler, supra; Sneeringer, supra***). I cannot agree with the majority's interpretation. Both the ***Chandler*** Court and the ***Sneeringer*** Court justified their holdings with broad language expressing the well-settled law that evidence concerning the relationship between a defendant and a victim are relevant and admissible to prove ill will, motive, or malice. ***Chandler,*** 554 Pa. at 409, 721 A.2d at 1044; ***Sneeringer,*** 668 A.2d at 1171. In the within case, the trial court explicitly stated several times, notably before the trial, during jury instructions, and in its 1925(a) opinion, that the letter would be limited to evidence of the status of the relationship. Because I believe the letter contains legitimate evidence of marital trouble, ***Chandler*** and ***Sneeringer*** should continue to apply.

[21] The exact testimony at issue in ***Thornton*** is as follows:

> Q: What was said by [the victim] in the car going downtown in reference to this gun that he had in his possession?
>
> A: Well, we asked him why he was carrying a gun, and he says he was carrying it for protection. We asked him why, protection against whom, and he says [the appellant was] after him. He didn't state why or how come.

Thornton, 494 Pa. at 264-65, 431 A.2d at 250-51.

¶ 8 In the within case, the victim's statement clearly presents evidence of Appellant's state of mind. As ***Chandler*** and ***Sneeringer*** indicate, a victim's statement regarding marital trouble may be admissible to establish the defendant's state of mind. ***See Chandler, supra; Sneeringer, supra.*** The ***Thornton*** hearsay statement was not a statement directly related to the victim's relationship with the appellant, but it was rather only a statement of the victim's fear of the appellant. However, in the within case, the trial court clearly limited the admissibility of the victim's letter to his statements regarding the status of his relationship to Appellant.

¶ 9 The majority also concludes that the Pennsylvania Supreme Court's more recent decision in ***Commonwealth v. Laich,*** 566 Pa. 19, 777 A.2d 1057 (2001), supports its contention that the victim's letter does not satisfy the state of mind exception. Majority Opinion at 11 n.6. Again, I respectfully disagree. The ***Laich*** Court states that its holding is based on relevancy, not the hearsay exceptions of the Pennsylvania Rules of Evidence. In fact, I believe a close examination of ***Laich*** reinforces my belief that ***Thornton*** would allow the contents of the victim's letter here to be admissible.

¶ 10 In ***Laich,*** the defendant was charged with first-degree murder. At trial, the defendant did not deny that he killed the victim, but rather contended that he was guilty only of voluntary manslaughter due to heat of passion.[22] ***Laich,*** 566 Pa. at 24, 777 A.2d at 1059-60. At issue was the testimony of a Commonwealth witness:

> Q: And what did [the victim] say that [the defendant] said to her?

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[22] The victim was the defendant's girlfriend, and the defendant caught her engaging in sexual relations with another man. ***Laich,*** 566 Pa. at 24, 777 A.2d at 1059.

> A: She said that he said if he couldn't have her, if—that if he ever caught her with another man, that he would kill them both.

Laich, 566 Pa. at 24, 777 A.2d at 1060.[23] The trial court and a panel of this Court found that the victim's statement was admissible under the state of mind exception to the hearsay rule. ***Id.***

¶ 11 The Pennsylvania Supreme Court reversed. However, the Court did not reverse because the statement did not fall under the state of mind exception; rather, it reversed because, based on the defendant's defense of "guilty only of voluntary manslaughter," the victim's state of mind regarding her relationship with the defendant was irrelevant, similar to its reasoning in ***Thornton.***[24] ***Laich,*** 566 Pa. at 28, 777 A.2d at 1062. Specifically, the Court stated, "[E]ven if the trial court *properly found that the state of mind exception had been met,* it still erred in allowing [the witness] to testify to [the victim's] out-of-court statement regarding [the defendant's] out-of-court statement because such testimony was not relevant to the case." ***Id.*** (emphasis added). This statement by the Court, along with the rest of its analysis of the victim's state of mind, indicates that the Court never intended for the Pennsylvania Rules of Evidence to exclude the "status-of-relationship state of mind" exception explicitly allowed by ***Chandler*** and ***Sneeringer.***

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[23] The witness's testimony also contained a double hearsay issue. However, the Pennsylvania Supreme Court found that the defendant's statement to the victim fell within the party admission exception. ***Laich,*** 566 Pa. at 25, 777 A.2d at 1060. Therefore, the primary issue was whether the victim's statement to the witness was admissible.

[24] According to the Court, the defendant's argument of "guilty only of voluntary manslaughter" effectively rendered the victim's state of mind irrelevant because the defendant's argument that he killed the victim because of provocation made only the defendant's state of mind relevant. ***Laich,*** 566 Pa. at 28, 777 A.2d at 1062.

¶ 12 The learned majority relies upon a strict reading of Pennsylvania Rule of Evidence 803(3) to find the letter inadmissible. However, my reading of 803(3) indicates that the letter still complies with the text of the rule. The text of Rule 803(3) creates a state of mind exception for "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health." Pa.R.E. 803(3). The majority believes that Rule 803(3) thus limits the exception to the *declarant's* intent, plan, or motive. Majority Opinion at 10. However, ever since the Pennsylvania Supreme Court adopted the Pennsylvania Rules of Evidence, the Pennsylvania Supreme Court has continued to find that a victim's statement regarding his or her relationship with the appellant may fall under the state of mind exception.[25] ***See Commonwealth v. Stallworth,*** 566 Pa. 349, 364, 781 A.2d 110, 118 (2001) (allowing the admission of a "Protection From Abuse" application and the victim's statements therein if the Commonwealth used them "to show the victim's state of mind regarding the relationship between [the] [a]ppellant and her and the malice and/or ill-will she perceived.").[26] ***See also Commonwealth v. Hutchinson,*** 571 Pa. 45, 57, 811 A.2d 556, 563 (2002) (Castille, J., concurring) ("This Court has consistently held that the out-of-court statements of a homicide victim, where probative of the victim's view of his or her relationship with the defendant, are relevant and admissible to show the presence of ill will, malice, or motive for the killing."). Based on the Court's rulings subsequent to the adop-

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[25] I note that the majority has not cited any case subsequent to the adoption of Rule 803(3) which holds that Rule 803(3) restricts the exception to the victim's motive.

[26] I note that ***Stallworth*** was decided approximately 1.5 months after ***Laich. See Stallworth, supra; Laich, supra.***

tion of the Pennsylvania Rules of Evidence, I do not believe Rule 803(3) restricts all evidence of a victim's statement regarding an intent, plan, or motive that is not hers, as long as the statement is relevant.

¶ 13 We are not confronted today with a ***Laich*** situation. The Commonwealth charged Appellant with accomplice liability to first-degree murder, and Appellant pleaded not guilty because she argued that she was not involved in the murder. Because the Pennsylvania Supreme Court and this Court have consistently found that a victim's state of mind regarding his or her relationship with the defendant may meet the state of mind exception, even in the wake of ***Laich*** and jurisprudence subsequent to the adoption of the Pennsylvania Rules of Evidence, it is clear that the victim's letter falls under the state of mind exception. Furthermore, based on ***Thornton*** and ***Laich,*** I would find that the victim's state of mind regarding the relationship between Appellant and him is relevant to the within case.

¶ 14 I therefore would find that the trial court acted properly in admitting the letter on a limited basis. The record supports the trial court's findings, and I would find that the letter may be admitted to establish motive, malice, or ill will. I would find that ***Chandler*** and ***Sneeringer*** control the issue and that they compel us to affirm the judgments.

APPENDIX E

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

NO. 1519 CRIMINAL 2002
DOCKET NO. 937EDA2004

COMMONWEALTH OF PENNSYLVANIA vs. TERI LYNN LEVANDUSKI, Defendant/Appellant

SUPPLEMENTAL STATEMENT PURSUANT TO Pa.R.A.P. 1925(a)

AND NOW, this 2nd day of June 2004, after review of Appellant's Concise Statement of Matters Complained of on Appeal, filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), this court makes the following supplemental statements:

Appellant alleges this court committed an error of law by allowing the Commonwealth to introduce at trial Commonwealth Exhibits 28 (note from kitchen garbage can), 28A (photograph of note), and 28B (typed copy of note), said exhibits being inadmissible hearsay.

In addressing the hearsay issue concerning the letter, this court first notes it relies in part on its Opinion and Order dated June 16, 2003. Concerning a recent Opinion of the United States Supreme Court, Crawford v. Washington, 124 S.Ct. 1354 (March 8, 2004), it is the view of this court the rule announced in Crawford v. Washington is not applicable to Commonwealth v. Levanduski.

The United States Supreme Court held in Crawford v. Washington out-of-court statements by witnesses, that are **testimonial in nature,** are barred under the Confrontation Clause of the Sixth Amendment of the United States Constitution, unless witnesses are both unavailable and defendants

had prior opportunity to cross-examine those witnesses making the testimonial statements, regardless of whether such statements are deemed reliable by courts. An important qualifier to this rule is as follows: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in the development of hearsay law ..." Crawford v. Washington, 124 S.Ct. at 1374. The Court, unfortunately, declined to define "testimonial": "We leave for another day any effort to spell out a comprehensive definition of 'testimonial'" Id.

The letter admitted during the Levanduski trial is nontestimonial and hence, not subject to Sixth Amendment restrictions. "Evidence used in court generally comprises three categories: testimonial evidence, documentary evidence, and demonstrative evidence." Commonwealth v. Serge, 837 A.2d 1255, 1261 (Pa. Super. 2003) (Citing 2 McCormick on Evidence § 212 (John W. Strong et al. eds., 5th ed.1999)). Testimony is evidence a competent witness under oath or affirmation gives at trial or in an affidavit or deposition. Black's Law Dictionary, Seventh Edition. Documentary evidence is evidence supplied by a writing or other document, which must be authenticated before the evidence is admissible. Id. It follows from reason documentary evidence is non-testimonial. "[N]on-testimonial evidence is beyond the purview of both State and Federal constitutional protection." Commonwealth v. Kahley, 356 A.2d 745, 753 (Pa. 1976).

The letter admitted is clearly documentary evidence because it is written. It is non-testimonial in nature because it was not given under oath or affirmation at trial or in an affidavit or deposition. It does contain an out-of-court statement but not one barred by Crawford, rather governed by the Pennsylvania Rules of Evidence and admissible pursuant to Commonwealth v. Puksar, 740 A.2d 219, 225 (Pa. 1999),

citing Commonwealth v. Griffin, 515 A.2d 865, 870 (Pa. 1986), and Commonwealth v. Brown, 648 A.2d 1177, 1182 (Pa. 1994).

Nothing further remains to be determined at this time.

BY THE COURT:

/s/Ronald E. Vican
RONALD E. VICAN, P.J.

cc: Ronald E. Vican, P.J.
District Attorney (MM)
Mark S. Love, Esq.
Paul Kramer, Esq.
Probation

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